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**The University of
Nottingham**

**NATIONAL AND INTERNATIONAL CRIMINAL JURISDICTION OVER UNITED
NATIONS PEACEKEEPING PERSONNEL FOR GENDER-BASED CRIMES AGAINST
WOMEN**

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for the degree of Doctor of Philosophy**

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Abstract

This thesis seeks to determine the most effective jurisdiction for criminal accountability for UN peacekeeping personnel who engage in sexual exploitation and abuse of women, and other conduct amounting to violence against women. As criminalisation is sought as the appropriate method of prevention and punishment of such conduct, it is first examined why criminalisation is necessary. The impact of sexual exploitation and abuse (SEA) on women in the territories in which peace operations are located is detailed as harms in the form of violations of the rights of these women. Alternatives to criminal sanctions are then considered, in particular the actions of the UN towards prevention and prohibition of SEA. While such regulations are necessary, they are ultimately inadequate in preventing and punishing SEA. Included is an assessment of the Draft Convention on Criminal Accountability of UN Officials and Experts on Mission, the adoption of which would support criminalisation.

However, the UN itself is unable to exercise criminal jurisdiction, and thus it is essential to examine which jurisdictions would be most effective in undertaking criminal prosecution of peacekeeping personnel. The choice between national jurisdictions and international criminal justice is debated. Which jurisdiction offers a more effectual forum for ensuring accountability? What potential impediments exist and how can such hindrances can be overcome?

This thesis argues that gender-based crimes by UN peacekeepers should be criminalised, and that, while the International Criminal Court should not be discounted as a potential forum for prosecuting perpetrators, domestic prosecutions are far more likely and far more effective.

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Table of Contents

ABSTRACT	I
ACKNOWLEDGEMENTS	II

TABLE OF CONTENTS.....	II
LIST OF ACRONYMS.....	VI
CASE LIST.....	IX
DOCUMENT LIST.....	XV
1. INTRODUCTION.....	1
1.1. CONTEXT OF RESEARCH.....	2
1.2. RESEARCH QUESTION	5
1.3. METHODOLOGY.....	6
1.3.1. Definitions	8
1.3.2. Emphasis on UN Peace Support Operations and Military Personnel.....	10
1.3.2.1. Military is a 'special community'	12
1.4. IMPORTANCE OF RESEARCH.....	17
2. CRIMINALISATION OF VIOLENCE AGAINST WOMEN BY PEACEKEEPERS	23
2.1. INTRODUCTION.....	23
2.2. DEFINITIONS AND THE PROBLEM	24
2.2.1. Sexual Exploitation	24
2.2.2. Prostitution.....	26
2.2.3. The Military, Peacekeepers, and Sex Trade.....	27
2.2.4. Violence against Women.....	30
2.2.5. Effects on the Mission of Sexual Exploitation and Abuse by Peacekeepers.....	34
2.3. PRINCIPLES OF CRIMINALISATION	35
2.3.1. Justification for Criminalisation.....	36
2.3.1.1. Harm to Others.....	36
2.3.1.2. Paternalism.....	39
2.3.1.3. Offence to Others.....	40
2.3.2. Other Factors in Criminalisation: Individual Liberties, Alternative Measures and Practical Issues	40
2.4. REASONS FOR CRIMINALISATION OF PROSTITUTION-RELATED ACTIVITIES AND SEXUAL EXPLOITATION BY PEACEKEEPERS	41
2.4.1. States' Obligations to Criminalise Violence against Women.....	42
2.4.2. Extraterritorial Application of Human Rights.....	49
2.4.2.1. International case law	50
2.4.2.2. Regional case law	52
2.4.2.3. Application to Peace Support Operations	55
2.4.3. Harm to Others- Violations of Rights as Harms against Women	58
2.4.3.1. Employment-related Rights and Freedom from Slavery	62
2.4.3.2. Right to Education	64
2.4.3.3. Right to Development	65
2.4.3.4. Right to Marriage and Family	66
2.4.3.5. Right to Health	66
2.4.3.6. Freedom from Torture and Inhuman and Degrading Treatment	69
2.4.3.7. Right to Life	70
2.4.3.8. Access to Justice	70
2.4.3.9. Freedom from Discrimination	71
2.4.4. Harm to Others and Paternalism- Sexually Transmitted Infections and HIV/AIDS.....	72
2.4.4.1. Prima Facie Argument in Favour of Criminalisation	79
2.4.5. Alternative Forms of Regulation- Codes of Conduct.....	80
2.4.5.1. National Codes of Conduct.....	80
2.4.5.2. United Nations Codes of Conduct	83
2.4.5.3. Are Codes of Conduct Effective as a Preventative Measure?.....	86
2.4.5.3.1. National Codes of Conduct.....	86
2.4.5.3.2. United Nations Codes of Conduct	87
2.4.6. Alternative Forms of Regulation- UN Regulations	88
2.5. CONCLUSION.....	89
3. UNITED NATIONS STEPS TOWARDS ACCOUNTABILITY OF PEACEKEEPING PERSONNEL.....	91

3.1.	INTRODUCTION	91
3.2.	THE PROHIBITION AND PREVENTION OF SEXUAL EXPLOITATION AND ABUSE IN UN MISSIONS	94
3.2.1.	<i>Secretary-General's Bulletin</i>	94
3.2.2.	<i>Revised Draft Model Memorandum of Understanding</i>	97
3.2.3.	<i>Conduct and Discipline Units</i>	99
3.2.4.	<i>In-mission Preventative Measures</i>	101
3.2.5.	<i>The need for more comprehensive training both pre- and post-deployment</i>	102
3.2.6.	<i>The need for adequate welfare and recreation facilities for personnel in the field</i>	105
3.2.7.	<i>Recording and reporting of misconduct cases and data</i>	110
3.3.	JURISDICTION	113
3.3.1.	<i>Draft Convention on the criminal accountability of UN officials and experts on mission</i>	118
3.3.1.1.	Definitions	120
3.3.1.2.	Scope of application	122
3.3.1.3.	Establishment of jurisdiction	125
3.3.1.4.	Investigations and the taking into custody of an alleged offender	126
3.3.1.5.	Prosecution and extradition of offenders	127
3.3.1.6.	Conduct which is not a crime under the law of the host State or the State party	129
3.3.1.7.	Exercise of jurisdiction in the territory of another State party	132
3.4.	IMMUNITY	133
3.5.	ACCOUNTABILITY	136
3.5.1.	<i>Accountability under the Draft Convention</i>	137
3.5.2.	<i>Ensuring managerial/superior and command responsibility</i>	141
3.6.	COOPERATION/ MUTUAL LEGAL ASSISTANCE	144
3.6.1.	<i>Lack of cooperation between the UN and states in misconduct investigations</i>	144
3.6.2.	<i>Cooperation and Mutual Legal Assistance under the Draft Convention</i>	147
3.6.2.1.	Cooperation	147
3.6.2.2.	Transfer of criminal proceedings and of prisoners	150
3.6.2.3.	Evidence obtained in the host State	151
3.6.2.4.	Notification of outcome of proceedings	151
3.7.	CONCLUSION	153
4.	NATIONAL CRIMINAL JURISDICTION	158
4.1.	INTRODUCTION	158
4.2.	JURISDICTION	159
4.2.1.	<i>Applicable Law to Australian Defence Force Personnel</i>	160
4.2.2.	<i>Extraterritorial Jurisdiction over Australian Defence Force Military and Civilian Personnel</i>	163
4.2.3.	<i>Applicable Law and Extraterritorial Jurisdiction over the United States Armed Forces</i>	167
4.2.4.	<i>Applicable Law and Extraterritorial Jurisdiction over US Civilians Accompanying or Employed by the Armed Forces</i>	169
4.3.	SUBSTANTIVE LAW PROVISIONS	174
4.3.1.	<i>Articles 133 and 134 of the US Uniform Code of Military Justice</i>	175
4.3.1.1.	Article 133 Conduct Unbecoming	175
4.3.1.2.	Article 134 the General Article	178
4.3.2.	<i>Prostitution-related Conduct</i>	180
4.3.2.1.	Article 133	182
4.3.2.2.	Article 134	189
4.3.3.	<i>Sexual exploitation</i>	191
4.3.4.	<i>Rape</i>	196
4.3.4.1.	Conduct Covered	197
4.3.4.2.	Consent	200
4.3.4.3.	Force and Threats	202
4.3.5.	<i>HIV/AIDS-related offences</i>	204
4.3.5.1.	Australia	204
4.3.5.2.	United States	211
4.3.6.	<i>Trafficking and Sexual Slavery</i>	214
4.3.7.	<i>War Crimes and Crimes Against Humanity</i>	219
4.4.	CONCLUSION	229
5.	INTERNATIONAL CRIMINAL COURT JURISDICTION	232

5.1.	INTRODUCTION	232
5.2.	INTERNATIONAL CRIMES	239
5.2.1.	<i>Crimes against Humanity</i>	240
5.2.1.1.	Widespread or Systematic Attack directed against Civilian Population	240
5.2.1.2.	Knowledge of or Intention that Conduct was Part of Widespread or Systematic Attack	243
5.2.2.	<i>War Crimes</i>	245
5.2.2.1.	'Part of a Plan or Policy or Part of a Large-Scale Commission of Such Crimes'	245
5.2.2.2.	Nexus with Armed Conflict	247
5.2.2.3.	Knowledge of Existence of Armed Conflict and Status of Victim	257
5.3.	GENDER-BASED CRIMES	259
5.3.1.	<i>Development in International Criminal Law</i>	259
5.3.2.	<i>The Rome Statute of the International Criminal Court</i>	265
5.3.2.1.	Rape	266
5.3.2.2.	Sexual Slavery	270
5.3.2.3.	Enforced Prostitution	272
5.3.2.4.	Sexual Violence	274
5.3.2.5.	A New Provision?	275
5.4.	COMMAND AND SUPERIOR RESPONSIBILITY	277
5.4.1.	<i>Development of Command/Superior Responsibility in International Criminal Law</i>	278
5.4.2.	<i>Application of Article 28 of the Rome Statute to Peace Support Operations</i>	283
5.4.2.1.	Authority, Command and Control Structure of a Peace Support Operation	283
5.4.2.2.	Command Responsibility	287
5.4.2.3.	Superior Responsibility	295
5.4.3.	<i>Conclusion</i>	299
5.5.	IMMUNITIES	300
5.6.	PROSECUTORIAL DISCRETION: THE BIG FISH/SMALL FISH DEBATE AND THE GRAVITY THRESHOLD	305
5.6.1.	<i>The Big Fish/Small Fish Debate</i>	306
5.6.1.1.	Peacekeeping Personnel as Small Fish	310
5.6.1.2.	Peacekeeping Personnel as Big Fish	311
5.6.2.	<i>The Gravity Threshold</i>	312
5.6.2.1.	Prosecutorial Application of the Gravity Threshold	313
5.6.2.2.	Pre-Trial Chamber Application of the Gravity Threshold	319
5.7.	CONCLUSION	324
6.	CONCLUSION	327
	APPENDICES	332
	BIBLIOGRAPHY	347

List of Acronyms

ACHPR	African Charter on Human and People's Rights
ACHR	American Convention on Human Rights
ACT	Australian Capital Territory
ADF	Australian Defence Force
ADFDAT	Australian Defence Force Discipline Appeal Tribunal
ALJR	Australian Law Journal Reports
ALR	Australian Law Reports
AMIS	African Union Mission in Sudan
AR	United States Army Regulations
BINUB	United Nations Integrated Office in Burundi
CAT	Convention Against Torture
CDU	Conduct and Discipline Unit
CEDAW	Convention on the Elimination of Discrimination Against Women
CID	United States military Criminal Investigation Division
CF	Canadian Forces
CLR	Commonwealth Law Reports
CMA	United States Court of Military Appeals
CONUS	Continental United States
CROC	Convention on the Rights of the Child
CRC	Committee on the Rights of the Child
Cth	Commonwealth (of Australia)
DFDA	<i>Defence Force Discipline Act (Cth) 1982</i>
DFS	Department of Field Support
DOD	United States Department of Defence
DPKO	Department of Peacekeeping Operations
DRC	Democratic Republic of Congo
EAW	European Arrest Warrant
ECCC	Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECOMOG	Economic Community of West African States Monitoring Group
ECOWAS	Economic Community of West African States
EU	European Union
FCAFC	Federal Court of Australia- Full Court
FOIA	United States Freedom of Information Act
GC I- IV	Geneva Conventions I, II, III and IV
HCA	High Court of Australia
HIV/AIDS	Human Immunodeficiency Virus/ Acquired Immunodeficiency Syndrome
HL	United Kingdom House of Lords
HRC	Human Rights Committee
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia

IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
IOM	International Organisation for Migration
KFOR	NATO Kosovo Force
MCM	United States Manual for Courts-Martial
MEJA	United States Military Extraterritorial Jurisdiction Act
MINURCAT	United Nations Mission in the Central African Republic and Chad
MINUSTAH	United Nations Stabilisation Mission in Haiti
MONUC	United Nations Mission in the Democratic Republic of Congo, Mission des Nations Unies en République Démocratique du Congo
NATO	North Atlantic Treaty Organization
NGO	Non-governmental Organisation
OCHA	Office for the Coordination of Humanitarian Affairs
OIOS	United Nations Office of Internal Oversight Services
OSCE-ODIHR	Organisation for Security and Co-operation in Europe Office for Democratic Institutions and Human Rights
PSO	Peace support operation
PTC	Pre-Trial Chamber
RCM	Rules for Court-Martial (in US Manual for Courts-Martial)
ROE	Rules of Engagement
SA	South Australia
SANDF	South African Defence Force
SCSL	Special Court for Sierra Leone
SEA	Sexual exploitation and abuse
SFOR	NATO Stabilisation Force in Bosnia and Herzegovina
SG	Secretary-General (of the United Nations)
SMSG	Special Representative of the Secretary-General
STI	Sexually transmitted infection
UCMJ	United States Uniform Code of Military Justice
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNAIDS	The Joint United Nations Programme on HIV/AIDS
UNAMIC	United Nations Advance Mission in Cambodia
UNAMID	African Union-United Nations Hybrid Operation in Darfur
UNAMSIL	United Nations Mission in Sierra Leone
UNMIBH	United Nations Mission in Bosnia and Herzegovina
UNDP	United Nations Development Programme
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNMEE	United Nations Mission in Ethiopia and Eritrea
UNMIBH	United Nations Mission in Bosnia and Herzegovina
UNMIK	United Nations Mission in Kosovo
UNMIL	United Nations Mission in Liberia
UNMIS	United Nations Mission in the Sudan
UNMISSET	United Nations Mission of Support in East Timor
UNMIT	United Nations Integrated Mission in Timor-Leste
UNOCI	United Nations Mission in Côte d'Ivoire
UNOHCHR/	United Nations Office of the High Commissioner for Human Rights
HCHR	
UNOSOM	United Nations Operation in Somalia

UNPROFOR	United Nations Protection Force
UNTAC	United Nations Transitional Authority in Cambodia
UNTAET	United Nations Transitional Authority in East Timor
USAF	United States Armed Forces
USACIDC	United States Criminal Investigation Division Command
US	United States
USSR	Union of Soviet Socialist Republics
Vic	Victoria, Australia

Case List

Domestic Courts

Australia

- *Hoffman v Chief of Army* [2003] ADFDAT 4 (1 September 2003).
- *Hoffman v Chief of Army* [2004] FCAFC 148 (31 May 2004).
- *McWaters v Day* [1989] HCA 59; (1989) 168 CLR 289 (5 December 1989).
- *Nydam v R* [1990] VR 430.
- *Polyukhovic v Cth* (1991) ALR 545.
- *R v Crabbe* (1985) 156 CLR 464.
- *R v Parenzee* [2006] SASC 127 (2 May 2006).
- *R v Parenzee* (2007) 248 LSJS 99.
- *R v Parenzee* [2007] SASC 143 (27 April 2007).
- *R v Parenzee* [2007] SASC 316 (24 August 2007).
- *R v Taktak* (1988) 14 NSWLR 226; 41 A Crim R 349.
- *Re Colonel Aird; Ex-parte Alpert* [2004] HCA 44; 220 CLR 308; 209 ALR 311; 78 ALJR 1451 (9 September 2004).
- *Re Tracey; Ex parte Ryan* [1989] HCA 12; (1989) 166 CLR 518 (10 February 1989).
- *Royall v R* (1991) 172 CLR 378.
- *Wilson v R* (1992) 174 CLR 313.
- *Vallance v R* (1961) 108 CLR 56.
- *X v The Commonwealth* [1999] HCA 63; 200 CLR 177; 167 ALR 529; 74 ALJR 176 (2 December 1999).
- *XYZ v The Commonwealth* [2006] HCA 25; (2006) 227 ALR 495; (2006) 80 ALJR 1036 (13 June 2006).

Canada

- Case No. 22, *The Abbaye Ardenne Case*, Trial Of S.S. Brigadefuhrer Kurt Meyer, Canadian Military Court, Aurich, Germany, 10-28 December, 1945 Law Reports of Trials of War Criminals, The United Nations War Crimes Commission, Volume IV, London, HMSO, 1948.
- *Ontario (Chief Medical Officer of Health) v. Ssenyonga*, [1991] O.J. No. 554 (Gen. Div.).
- *R v Aziga* [2006] OJ No 4545 (QL).
- *R v Aziga* [2006] OJ No 5232 (QL).
- *R. v. Aziga*, 2007 CanLII 249 (ON S.C.).
- *R. v. Aziga*, 2007 CanLII 56095 (ON S.C.).
- *R. v. Aziga*, 2008 CanLII 29780 (ON S.C.).
- *R. v. Aziga*, 2008 CanLII 39222 (ON S.C.).
- *R. v. Aziga*, 2008 CanLII 39612 (ON S.C.).
- *R. v. Aziga*, 2008 CanLII 53841 (ON S.C.).
- *R. v. Aziga*, 2008 CanLII 60336 (ON S.C.).
- *R. v. Aziga*, 2008 CanLII 66631 (ON S.C.).
- *R v Cuerrir*, [1998] 2 SCR 371.
- *R v D(N)*, [2006] JE 2006-273; [2006] CarswellQue 19.
- *R v Ssenyonga* (1992) 73 CCC (3-d) 216 (Ont Ct, Prov Div).
- *R v Walkem*, [2007] OJ No 186 (Westlaw).
- *Regina v Finta* [1994] 1 SCR 701.
- *Williams v R*, 2001 NFCA 52; (2001), 158 CCC (3d) 523.

France

- *In re Barbie*, Judgment of 20 December 1985, Cass. Crim., 1986 J.C.P. II G, No. 20, 655.

Italy

- *Public Prosecutor v Ashby*, Judgment No. 161/98, Court of Trento, 13 July 1998.

Israel

- *Attorney-General of the Government of Israel v. Eichmann*, (1961) 36 ILR. 5 (Israel Supreme Court, 1962), District Court of Jerusalem.
- The Government of Israel against Papa Coli Ben Dista Saar, District Court of Haifa, Judgement of 10 May 1979, United Nations Juridical Yearbook 1979 (United Nations, New York, 1982), p. 205.

United Kingdom

- Case No. 44, The Trial Of *Albert Kesselring*, British Military Court At Venice, Italy, 17th February-6th May, 1947 Law Reports of Trials of War Criminals, The United Nations War Crimes Commission, Volume VIII, London, HMSO, 1949.
- *Al-Skeini et ors v. Secretary of State for Defence* [2007] UKHL 26.
- *Attorney-General v Nissan* [1969] All ER 629.
- *Edwards v Government of the USA* [2007] EWHC 1877 (Admin).
- *Norris v Secretary of State for the Home Department* [2006] EWHC 280 (Q.B. Admin).
- *Norris v Government of the USA & Ors* [2007] EWCA 71 (Admin).
- *Norris v Government of the USA & Ors* [2008] UKHL 16.
- *R v DPP, ex p C* [1995] 1 Cr App R 136.
- *R v DPP, ex p Manning and Another* [2000] 3 WLR 463.
- *R v Metropolitan Police Commissioner, ex p Blackburn* [1968] 2 QB 118.
- *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet; Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* (On Appeal from a Divisional Court of the Queen's Bench Division) [1999] UKHL 17.
- *Shaw v DPP* [1962] AC 220.

United States

- *Able v United States*, 155 F.3d 628 (2nd Cir. 1998).
- *Ex parte Quirin*, 317 U.S. 1 (1942).
- *Grisham v Hagan*, 361 U.S. 278 (1960).
- *In re Yamashita* (1945) 327 US 1.
- *Kinsella v Krueger* 351 U.S. 470 (1956).
- *Kinsella v Singleton*, 361 U.S. 234 (1960).
- *Latney v Ignatious*, 416 F.2d 821 (D.C. Cir. 1969).
- *Levy v Parker*, 478 F.2d 772, at 790-92.
- *Love v Superior Court*, 276 Cal. Rptr. 660 (Ct. App. 1990).
- *McElroy v Guagliardo*, 361 U.S. 281 (1960).
- *O'Callaghan v Parker*, 395 U.S. 258 (1969).
- *Parker v Levy* 417 U.S. 733 (1974).
- *Reid v Covert*, 354 U.S. 1 (1957).
- *Relford v Commandant*, 420 U.S. 738 (1975).
- *Solorio v United States* 483 U.S. 435 (1987).
- *United States v Avarette*, 41 C.M.R. 363 (1970); 19 C.M.A. 363 (1970).

- *United States v Bowman*, 260 U.S. 94, 98, 43 S.Ct. 39, 67 L.Ed. 149 (1922).
- *United States v Bright*, 66 M.J. 359 (2008).
- *United States v Brown*, 55 M.J. 375 (2001).
- *United States v Bygrave*, 40 M.J. 839 (NMCMR 1994).
- *United States v Calley*, 46 CMR 1131 (1971); *aff'd*, 22 USCMA 534, 48 CMR 19 (1973).
- *United States v Cherukuri*, 53 M.J. 68 (2000).
- *United States v Corey*, 232 F.3d 1166.
- *United States v Davis*, 26 M.J. 445 (1988).
- *United States v Dumford*, 30 M.J. 137 (CMA 1990).
- *United States v Frelix-Vann*, 55 M.J. 329, 332 (C.A.A.F. 2001).
- *United States v Foster*, 40 M.J. 140 (1994).
- *US v Gary* 74 F.3d 304, 313 (1st Cir.), *cert. denied*, 116 S. Ct. 2567 (1996).
- *United States v Gatlin*, 216 F.3d 207 (2000).
- *United States v Giordano*, 15 USCMA 163, 35 CMR 135 (1964).
- *United States v Guaglione*, 27 M.J. 268 (1988).
- *United States v Guerrero*, 31 M.J. 692 (N.M.C.M.R. 1990).
- *United States v Hooper*, 9 U.S.C.M.A. 637 (1958).
- *United States v Howe*, 37 CMR 429 (1967).
- *United States v Hullett*, 40 M.J. 189 (C.M.A. 1994).
- *United States v Kerr*, 1997 CCA Lexis 603.
- *United States v Leak*, 61 MJ 234 (2005).
- *United States v Major Johnnie Hargrove, Jr.*, ARMY 9701151, US Army Court of Criminal Appeals, 19 April 1999.
- *United States v Johnson*, 30 M.J. 53 (CMA 1990).
- *United States v Joseph*, 37 M.J. 392 (CMA 1993).
- *United States v Mallory*, CM 374664, 17 CMR 409 (1954).
- *United States v Miller*, 47 M.J. 352 (1997).
- *United States v Negron*, 28 M.J. 775 (ACMR), *aff'd*, 29 M.J. 324 (CMA 1989).
- *United States v Norvell*, 26 MJ 477 (CMA 1988).
- *US v Parham* 16 F.3d 844, 846 (8th Cir. 1994).
- *United States v Peszynski*, 40 M.J. 874 (1994).
- *US v Redondo-Lemos* 27 F.3d 439, 444 (9th Cir. 1994).
- *United States v Reister*, 40 M.J. 666 (NMCMR 1994).
- *United States v Rice*, 14 CMR 316 (1954).
- *United States v Ronghi*, No. ARMY 20000635, (A. Ct. Crim. App. May 27, 2003).
- *United States v Ronghi*, 60 M.J. 83, 86 (C.A.A.F. 2004).
- *United States v Sargeant*, 29 M.J. 812 (ACMR 1989).
- *United States v Schofield*, 40 M.J. 132 (CMA 1994).
- *United States v Simpson*, 58 MJ 368 (2003).
- *United States v Stewart*, 29 M.J. 92 (CMA 1989).
- *United States v Terry*, 64 MJ 295 (2006).
- *United States v Timberlake*, 18 M.J. 371 (1984).
- *United States v Tollinchi*, 54 M.J. 80 (2000).
- *United States v van Steenwyk*, 21 M.J. 795 (1985).
- *United States v Vaughan*, 02-0313/AF (2003).
- *United States v Wainwright*, 42 C.M.R. 997 (A.F.C.M.R.), *aff'd* 43 C.M.R. 23 (1970).
- *United States v Webster*, 37 MJ 670.
- *US v Wilhelm von Leeb et al.*, UN War Crimes Commission, 12 Law Reports of Trials of War Criminals 23 (1948) (*High Command Case*).

- *United States v Woods*, 28 M.J. 318-19 (CMA 1989).

International and Regional Courts and Tribunals

European Court of Human Rights

- *Bankovic et ors v Belgium and 16 other contracting states (Admissibility)*, Application no. 52207/99, Decision of the Grand Chamber 12 December 2001.
- *Behrami and Behrami v France; Saramati v France, Germany and Norway*, Application Nos. 7412/01 and 78166/01, Decision of the Grand Chamber 2 May 2007.
- *Drozdz and Janousek v France and Spain*, Application no. 12747/87, Judgment 26 June 1992.
- *Issa et ors v Turkey*, Application no. 31821/96, Judgment 16 November 2004.
- *Loizidou v Turkey*, Application no. 15318/89, Judgment 18 December 1996.
- *Öcalan v Turkey*, Application no. 46221/99, Judgment 12 March 2003.
- *Soering v UK*, Application no. 14038/88, Judgment 7 July 1989.
- *Stocké v the Federal Republic of Germany*, Application no. 11755/85, Report of the Commission adopted 12 October 1989.
- *X and Y v The Netherlands* (1985) 8 EHHR 235.

Human Rights Committee

- *Delia Saldias de Lopez v Uruguay*, Communication No. 52/1979, CCPR/C/OP/1 at 88 (1984).

Inter-American Commission on Human Rights

- *Alejandro et al. v Cuba*, Report No. 86/99, 29 September 1999.
- *Coard et al. v United States*, Case No. 10.951, Report No. 109/99, 29 September 1999.

Inter-American Court of Human Rights

- *Velasquez Rodriguez Case*, Judgment of 29 July 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).

International Court of Justice

- *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, (2005) ICJ Gen. List No. 116, 19 December 2005.
- *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)*, Judgment of 14 February 2002, ICJ Reports 2002, p. 3.
- *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962 ICJ Reports 1962, p.151.
- *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion of 29 April 1999, ICJ Reports 1999, p. 62.
- *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Gen. List No. 131, ICJ Reports 2004.
- *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 226.
- *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, ICJ Reports 1986, p. 14.
- *The Case of the S.S. "Lotus"*, (France v Turkey), PCIJ, Ser. A, No. 10 (1927).

International Criminal Court

- *Prosecutor v Abu Garda*, Decision on the Confirmation of Charges, ICC-02/05-02/09 (8 February 2010).

- *Prosecutor v Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424 (15 June 2009).
- *Decision on the Prosecutor's Application for Warrants of Arrest, Article 58 (Lubanga/Ntaganda)*, Pre-Trial Chamber I, No.: ICC-01/04-01/07 (10 February 2006).
- *Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58" (Ntaganda Appeal)*, ICC-01/04 (13 July 2006).
- *Prosecutor v Lubanga*, Decision on the confirmation of charges, ICC-01/04-01/06 (29 January 2007).
- *Prosecutor v Lubanga*, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, ICC-01/04-01/06-1401 (13 June 2008).
- *Prosecutor v Lubanga*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", ICC-01/04-01/06-1486 (21 October 2008).
- *Prosecutor v Katanga and Ngudjolo Chui*, Decision on the confirmation of charges, ICC-01/04-01/07 (30 September 2008).

International Criminal Tribunal for Rwanda

- *Prosecutor v. Akayesu*, Trial Chamber Judgement, ICTR-96-4-T (2 September 1998).
- *Prosecutor v. Akayesu*, Appeal Judgement, ICTR-96-4-A (1 June 2001).
- *Prosecutor v Bagosora*, Trial Judgement, ICTR-98-41-T (18 December 2008).
- *Prosecutor v Gacumbitsi*, Trial Chamber Judgement, ICTR-2001-64-T, (17 June 2004).
- *Prosecutor v Kayishema and Ruzidana*, Judgement and Sentence, ICTR-95-1-T (21 May 1999).
- *Prosecutor v Muhimana*, Trial Judgement, ICTR-95-1B-T (28 April 2005).
- *Prosecutor v Musema*, Trial Chamber Judgement, ICTR-96-13-A (27 January 2000).
- *Prosecutor v Muyunyi*, Trial Judgement, ICTR-00-55A-T (12 September 2006).
- *Prosecutor v Semanza*, Judgment and Sentence, ICTR-97-20-T (15 May 2003).
- *Prosecutor v Serushago*, Sentencing Judgment, ICTR-98-39 (5 February 1999).

International Criminal Tribunal for the Former Yugoslavia

- *Prosecutor v Ademi and Norac*, Decision for referral to the authorities of the Republic of Croatia pursuant to rule 11 *bis*, IT-04-78-PT (14 September 2005).
- *Prosecutor v Aleksovski*, Trial Chamber Judgement, IT-94-14/1-T (25 June 1999).
- *Prosecutor v Blaškić*, Appeal Chamber Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (29 October 1997).
- *Prosecutor v Blaškić*, Trial Chamber Judgement, IT-95-14-T (3 March 2000).
- *Prosecutor v Blaškić*, Appeal Judgement, IT-95-14-A (29 July 2004).
- *Prosecutor v Blaškić*, Appeal Chamber Judgement, IT-95-14-A (29 July 2004).
- *Prosecutor v Delalić et al. (Čelebići)*, Trial Chamber Judgement, IT-96-21-T (16 November 1998).
- *Prosecutor v Delalić et al. (Čelebići)*, Appeal Chamber Judgement, IT-96-21-A (20 February 2001).
- *Prosecutor v Furundžija*, Amended Indictment, IT-95-17/1-PT (2 June 1998).
- *Prosecutor v Furundžija*, Trial Chamber Judgement, IT-95-17/1-T (10 December 1998).
- *Prosecutor v Janković*, Decision on Referral of Case under Rule 11 *Bis*, IT-96-23/2-PT (22 July 2005).

- *Prosecutor v Janković*, Appeals Chamber Decision on Rule 11 *Bis* Referral, IT-96-23/2-AR11bis.2.
- *Prosecutor v Jelisić*, Trial Judgement, IT-95-10-T (14 December 1999).
- *Prosecutor v Kordić*, Appeal Judgement, IT-95/14/2-A (17 December 2004).
- *Prosecutor v Krstić*, Trial Chamber Judgement, IT-98-33 (2 August 2001).
- *Prosecutor v Kunarac et al. (Foca)*, Trial Chamber Judgement, IT-96-23-T & IT-96-23/1-T (22 February 2001).
- *Prosecutor v Kunarac et al. (Foca)*, Appeals Chamber Judgement, IT-96-23-A (12 June 2002).
- *Prosecutor v Kupreškić*, Trial Judgement, IT-95-16-T (14 January 2000).
- *Prosecutor v Kvočka et al.*, Trial Chamber Judgement, IT-98-30/1-T (2 November 2001).
- *Prosecutor v Međakić et al.*, Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11 *Bis*, IT-02-65-PT (20 July 2005).
- *Prosecutor v Dragan Nikolić*, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, IT-94-2-PT (9 October 2002).
- *Prosecutor v Plavšić*, Sentencing Judgment, ICTY-00-39 & 40/1 (27 February 2003).
- *Prosecutor v Rajić*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, ICTY-95-12-R61 (13 September 1996).
- *Prosecutor v Rašević & Todović*, Decision on Referral of Case under Rule 11 *Bis*, IT-97-25/A-PT (8 July 2005).
- *Prosecutor v Stanković*, Decision on Referral of Case under Rule 11 *Bis*, IT-96-23/2-PT (17 May 2005).
- *Prosecutor v Strugar*, Trial Judgement, IT-01-42-T (31 January 2005).
- *Prosecutor v Tadić*, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction IT-94-1-AR72 (2 October 1995).
- *Prosecutor v Tadić*, Trial Judgement, IT-94-1-T (7 May 1997).
- *Prosecutor v Tadić*, Sentencing Judgement, IT-94-1-T (14 July 1997).
- *Prosecutor v Tadić*, Appeal Judgement, IT-94-1-A (15 July 1999).
- *Prosecutor v Tadić*, Sentencing Judgement, IT-94-1-Tbis-R117 (11 November 1999).
- *Prosecutor v Todorović*, IT-95-9/1-S Sentencing Judgement (31 July 2001).

Special Court for Sierra Leone

- *Prosecutor v. Brima, Kamara and Kanu (AFRC Case)*, SCSL-2004-16-PT, Trial Judgement (20 June 2007).
- *Prosecutor v. Brima, Kamara and Kanu (AFRC Case)*, SCSL-2004-16-A, Appeal Judgement (22 Feb 2008).
- *Prosecutor v Sesay, Kallon and Gbao (RUF Case)*, Trial Judgement, SCSL-04-15-T (2 March 2009).
- *Prosecutor v Taylor*, Decision on Immunity from Jurisdiction, SCSL-2003-01-I (31 May 2004).

Other

- *Alabama Claims (U.S. v Gr. Brit.)*, 3 Geneva Arb. 8 (1872).

Document List

Conventions, Declarations and Protocols

Abolition of Forced Labour Convention (ILO No. 105), 320 UNTS 291, entered into force 17 January 1959

American Convention on Human Rights, OAS Treaty Series No. 36, 1144 UNTS 123, entered into force 18 July 1978

Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 13, entered into force 3 September 1981

Convention on the Privileges and Immunities of the United Nations, 1 UNTS 15, entered into force 17 September 1946

Convention on the Rights of the Child, 1577 UNTS 3, entered into force 2 September 1990

Convention on the Safety of United Nations and Associated Personnel, 2051 UNTS 363, entered into force 15 January 1999

Declaration on the Elimination of Violence against Women, A/RES/48/104, 23 February 1994

Declaration on the Right to Development, A/RES/41/128, 4 December 1986

European Convention for the Protection of Human Rights and Fundamental Freedoms, (ETS 5), 213 UNTS 222, entered into force 3 September 1953

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31, entered into force 21 October 1950

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85, entered into force 21 October 1950

Geneva Convention relative to the Treatment of Prisoners of War, 75 UNTS 135, entered into force 21 October 1950

Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287, entered into force 21 October 1950

Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, 33 ILM 1534 (1994), entered into force 5 March 1995

International Convention for the Suppression of Acts of Nuclear Terrorism, 44 ILM 815, entered into force 7 July 2007

International Covenant on Civil and Political Rights, 999 UNTS 171, entered into force 23 March 1976

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3, entered into force 7 December 1978

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, CAB/LEG/66.6, 13 September 2000

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, GA RES. 25, annex II, A/45/49 (Vol. I) (2001), entered into force 25 December 2003

Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 226 UNTS 3, entered into force 30 April 1957

United Nations Convention against Corruption, A/RES/58/422, 31 October 2003, entered into force 14 December 2005

United Nations Convention against Transnational Organized Crime, A/RES/55/25, entered into force 29 September 2003

Vienna Convention on the Law of Treaties, 1969, UNTS, vol. 1155, p. 331, entered into force on 27 January 1980

International Statutes and Rules

ICTY Rules of Procedure and Evidence, IT/32/Rev 39 (22 September 2006)

Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea

Rome Statute of the International Criminal Court, 2187 UNTS 90, entered into force 1 July 2002

Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by S/RES/827 (1993)

Statute of the International Tribunal for Rwanda, adopted by S/RES/955 (1994)

Statute of the Special Court for Sierra Leone, 16 January 2002

Statute of the Special Tribunal for Lebanon, S/RES/1757 (2007)

Reports, Comments, Bulletins and Resolutions

CEDAW General Recommendation 24 (20th Session, 1999): Article 2: Women and Health, A/54/38/Rev.1 part I (1999)

The Comprehensive Report on Lessons Learned from United Nations Operation in Somalia (UNOSOM) April 1992 - March 1995

CRC General Comment 4 (33rd session, 2003): Adolescent Health and Development in the Context of the Convention on the Rights of the Child, A/59/41 (2004) 102

Final Report on the first evaluation exercise- mutual legal assistance in criminal matters, (2001/C 216/02), Official Journal of the European Communities, C 216, 01/08/2001, P. 0014-0026, 32001X0801(02)

Final Report of the Special Rapporteur of the Working Group on Contemporary Forms of Slavery, on systematic rape, sexual slavery and slavery-like practices during armed conflict, E/CN.4/Sub.2/1998/13, 22 June 1998

General Assembly Resolution on Comprehensive review of the whole question of peacekeeping operations in all their aspects, A/RES/61/291, 24 August 2007

General Assembly Resolution of Criminal accountability of UN officials and experts on mission, A/RES/62/63, 8 January 2008

General Assembly Resolution of Criminal accountability of UN officials and experts on mission, A/RES/63/119, 11 December 2008

Human Rights Committee, General Comment No. 31 [80] The Nature of the General Legal Obligation Imposed on State Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13

Human Rights Committee, Summary Record of the 1680th Meeting, 24 September 1998, CCPR/C/SR.1680

Human Rights Committee, Summary Record of the 1707th Meeting, 27 October 1998, CCPR/C/SR.1707

ICCPR General Comment 20 (Forty-fourth session, 1992): Article 7: Concerning Prohibition of Torture and Cruel Treatment or Punishment, A/47/40 (1992) 193

ICCPR General Comment 28 (68th session, 2000): Article 3: Equality of Rights Between Men and Women, A/55/40 vol. I (2000) 133

Investigation by the Office of Internal Oversight Services into allegations of sexual exploitation and abuse in the United Nations Organization Mission in the Democratic Republic of the Congo, A/59/661, 5 January 2005

IOM Kosovo, Return and Reintegration Project, Situation Report – February 2000 to September 2002, 2002

Jennifer K. Elsea, CRS Report for Congress: U.S. Treatment of Prisoners in Iraq: Selected Legal Issues, (Congressional Research Service/The Library of Congress, 19 May 2005), <http://fpc.state.gov/documents/organization/44013.pdf>, at CRS-17- CRS-18

Letter dated 24 March 2005 from the Secretary-General to the President of the General Assembly, 24 March 2005, A/59/710

Letter dated 24 May 1994 from the Secretary-General to the President of the Security Council, A/1994/674 (1993), annex Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992)

Model Memorandum of Understanding, A/61/19 (Part III), Annex, 12 June 2007

Model Status of Forces Agreement, A/45/594, Annex

Negotiated Relationship Agreement between the International Criminal Court and the United Nations, ICC-ASP/3/Res.1, entered into force 4 October 2004

OCHA Guinea, Victims of security forces crackdown Situation, Report No. 1, 2 October 2009; Report No. 2, 8 October 2009; Report No. 3 18 October 2009

Programme Of Action Of The International Conference On Population And Development, Cairo, 5-13 September 1994

Report of the Ad Hoc Committee on criminal accountability of United Nations officials and experts on mission, First session (9-13 April 2007), A/62/54

Report of the Group of Legal Experts on ensuring accountability of United Nations staff and experts on mission with respect to criminal acts committed in peacekeeping operations, A/60/980, 16 August 2006

Report of the group of legal experts on making the standards contained in the Secretary-General's Bulletin binding on contingent members and standardising the norms of conduct so that they are applicable to all categories of peacekeeping personnel, A/61/645, 18 December 2006

Report of the Office of Internal Oversight Services on the investigation into sexual exploitation of refugees by aid workers in West Africa, 11 October 2002, A/57/465

Report of the Office of Internal Oversight Services on strengthening the investigation functions in the United Nations, A/RES/59/287, 21 April 2005

Report of the Secretary-General, Comprehensive report of conduct and discipline including full justification of all posts, A/62/758, 20 March 2008

Report of the Secretary-General, Comprehensive review of the welfare and recreation needs of all categories of peacekeeping personnel, A/62/663, 24 January 2008

Report of the Secretary-General, Criminal accountability of United Nations officials and experts on mission, 11 August 2008, A/63/260

Report of the Secretary-General, Criminal accountability of United Nations officials and experts on mission, A/64/183, 28 July 2009

Report of the Secretary-General, In-depth study on all forms of violence against women, A/61/122/Add.1, 6 July 2006

Report of the Secretary-General pursuant to Security Council resolution 1820 (2008), S/2009/362, 20 August 2009

Report of the Special Committee on Peacekeeping Operations and its Working Group on the 2007 resumed session, A/61/19 (Part III), 12 June 2007

Secretary-General's Bulletin, Observance by United Nations forces of international humanitarian law, ST/SGB/1999/13, 6 August 1999

Secretary-General's Bulletin, Special measures for protection from sexual exploitation and sexual abuse, ST/SGB/2003/13, 9 October 2003

Secretary-General Press Release, 'Secretary-General 'Absolutely Outraged' by Gross Misconduct by Peacekeeping Personnel in Democratic Republic of Congo', 19 November 2004, SG/SM/9605, AFR/1069, PSO/115

Security Council Resolution S/RES/1244 (1999)

Security Council Resolution S/RES/1422 (2002)

Security Council Resolution S/RES/1487 (2003)

Security Council Resolution S/RES/1503 (2003)

Security Council Resolution S/RES/1534 (2004)

Security Council Resolution S/RES/1593 (2005)

Security Council Resolution S/RES/1820 (2008)

Special Measures for protection from sexual exploitation and abuse: Report of the Secretary-General, A/59/782, 15 April 2005

Special Measures for protection from sexual exploitation and abuse: Report of the Secretary-General, A/60/861, 24 May 2006

Special Measures for protection from sexual exploitation and abuse: Report of the Secretary-General, A/61/957, 15 June 2007

Special Measures for protection from sexual exploitation and abuse: Report of the Secretary-General, A/62/890, 25 June 2008

Special Measures for protection from sexual exploitation and abuse: Report of the Secretary-General, A/63/720, 17 February 2009

The Office of the Prosecutor, Report on the activities performed during the first three years (June 2003- June 2006), 12 September 2006

The Office of the Prosecutor, Report on Prosecutorial Strategy, 14 September 2006 (hereinafter Prosecutorial Strategy)

UNAIDS, 'On The Front Line: A review of policies and programmes to address HIV/AIDS among peacekeepers and uniformed services', 2003, Copenhagen, UNAIDS/03.44E

UNHCR and Save the Children UK, 'Sexual Violence and Exploitation: The Experience of Refugee Children in Liberia, Guinea and Sierra Leone', (2002), *available at* <http://www.womenwarpeace.org/docs/savereport.doc>

United Nations Sixth Committee, Summary record of the 5th meeting (2008), A/C.6/63/SR.5

Other

Code of Conduct for Members of the United States Armed Forces, Executive Order 10631 of 17 August 1955

Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), Official Journal of the European Communities, L 190/1

The Department of the Army Field Manual 27-10, The Law of Land Warfare (July 1956)

Manual for Courts-Martial United States (2005 Edition)

Manual for Courts-Martial United States (2008 Edition)

National Defence, Office of the Judge Advocate General, Code of Conduct for CF Personnel, document number B-GG-005-027/AF-023

Office of the Prosecutor, "'Attacks on peacekeepers will not be tolerated",' ICC Prosecutor presents evidence in third case in Darfur', Press Release ICC-OTP-20081120-PR374, 20 November 2008

Paper on some policy issues before the Office of the Prosecutor, September 2003, *available at* http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf

'Pre-Trial Chamber I requests additional information in relation to the application for a warrant of arrest for three rebel commanders in Darfur', Press Release ICC-CPI-20081210-PR381, 10 December 2008

Prosecutor's communication response to communications concerning the situation in Iraq (9 February 2006) *available at* http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf

Rape and Sexual Assault: A Legal Study, S/1994/674/Add.2 (Vol. I), Annex II

Statement by Luis Moreno-Ocampo, Informal meeting of Legal Advisors of Ministries and Foreign Affairs, New York, 24 October 2005

Statement by Luis Moreno-Ocampo, Fourth Session of the Assembly of States Parties, 28 November 2005

Background Situation in the Central African Republic, 22 May 2007, ICC-OTP-BN-20070522-220-A_EN

Unclassified cable, subject: Trafficking in women: turning a blind eye?, Doc Nbr: 2000SARAJE09710, Oct 2000, Date/Case ID: 11 Aug 2003 200102920

UN Model Treaty on Extradition, GA RES. 45/116, 14 December 1990, amended by GA RES 52/88, 12 December 1997

UN Model Treaty on Mutual Assistance in Criminal Matters, GA RES. 45/117, amended by GA RES 53/112

United Nations Peacekeeping Operations Principles and Guidelines (New York: Peacekeeping Best Practices Section, Division of Policy, Evaluation and Training, Department of Peacekeeping Operations, United Nations, January 2008)

Working paper on the accountability of international personnel taking part in peace support operations submitted by Françoise Hampson, (7 July 2005), E/CN.4/Sub.2/2005/42

“As far as I’m concerned, there is no such thing as consensual sex between soldiers and the local civilian population in a war or conflict zone.”

*Romeo Dallaire*¹

1. Introduction

Over the past years, allegations have arisen of peacekeeping personnel committing sexual exploitation and abuse (SEA) against women in the territories where peace support operations (PSOs) are located.² Allegations have included conduct such as sexual conduct with minors, rape, sexual slavery, involvement in trafficking, and sexual conduct with prostitutes.³

Violence against women such as sexual exploitation and abuse, rape, sexual slavery, and prostitution-related activities is harmful to the women involved, and amounts to criminal conduct. Sexual exploitation and abuse by peacekeepers must be prevented and, when it occurs, punished. Punishment is necessary to deter, and as a method of restoring the balance of justice after the commission of a crime, and the criminal justice system is the preferred option.⁴ However, UN PSOs are usually located in failed states- states in a situation of armed conflict or post-conflict. There is little infrastructure to enable prosecution for criminal offences. In addition, there are organisational dilemmas: personnel are repatriated for misconduct without any further repercussions for their behaviour, resulting in impunity for perpetrators of SEA.

Such conduct not only damages the reputation of the UN; it further impedes the ability of peace support operations to function effectively by damaging the credibility of the mission amongst the local and international communities, as well as by causing friction within the mission itself.⁵ Finally, this conduct contributes to a reduction in numbers of mission personnel due to repatriation. Most importantly, such conduct has victims. Such crimes can be committed against both male and female

¹ R. Dallaire, *Shake Hands With the Devil*, (Arrow Books, London 2003), p. 184.

² Special measures for protection from sexual exploitation and sexual abuse, Report of the Secretary General, A/59/782 (2005), A/60/861 (2006), A/61/957 (2007), A/62/890 (2008), A/63/720 (2009).

³ *Ibid.*

⁴ K.M. Carlsmith, et al., 'Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment' (2002) 83 (2) *Journal of Personality and Social Psychology* 284-299.

⁵ Dallaire, *supra* note 1.

victims, but the majority of victims of such conduct are women. It is for this reason that this thesis analyses crimes against women.

1.1. Context of Research

Previous research and reporting into the problem of discipline of peacekeeping personnel has mostly stemmed from the incidences of sexual exploitation, trafficking of women, and use of prostitutes. Reports from non-governmental organisations (NGOs) and think-tanks have recounted incidences of SEA by personnel and criticised organisations for lack of response.⁶ The 'boys will be boys' attitude of organisations, and the military in particular, has been highlighted.⁷ This perspective is one which relegates sexual exploitation and abuse to 'normal' conduct of men. The reports often offer recommendations to organisations and states to assist with the prevention and punishment of this conduct.

Other studies have analysed specific examples of gender issues in PSOs, with an emphasis on sexual exploitation and abuse, including prostitution.⁸ The impact of military operations, particularly peacekeeping missions, on the prostitution trade in host states has been highlighted.⁹ Such research

⁶ E. Schade, 'Experiences with regard to The United Nations Peace-Keeping Forces in Mozambique' (International Save the Children Alliance, Barrio, 20 November 1995), M. Vandenberg, 'Hopes Betrayed: Trafficking of Women and Girls to Post-Conflict Bosnia and Herzegovina for Forced Prostitution' (Human Rights Watch, New York, November 2002) Vol. 14, No. 9 (D); 'Kosovo (Serbia and Montenegro) "So does it mean that we have the rights?" Protecting the human rights of women and girls trafficked for forced prostitution in Kosovo' (Amnesty International, 6 May 2004) EUR 70/010/2004; S.E. Mendelson, 'Barracks and Brothels: Peacekeepers and Human Trafficking in the Balkans' (Center for Strategic and International Studies (CSIS), Washington, D.C., February 2005); S. Martin, 'Must Boys be Boys? Ending Sexual Exploitation & Abuse in UN Peacekeeping Missions' (Refugees International, October 2005) 'From Camp to Community: Liberia study on exploitation of children' (Save the Children UK, Monrovia, 8 May 2006).

⁷ E.g. Mendelson, *ibid.*, p. 19; Martin, *ibid.*

⁸ P. Higate, 'Gender and Peacekeeping Case Studies: The DRC and Sierra Leone' (Institute for Security Studies, March 2004) ISS Monograph No. 91; P. Higate, 'Peacekeepers and Gender: DRC and Sierra Leone', *Pambazuka News*, (8 July 2004), <http://www.pambazuka.org/#2>; P. Higate and M. Henry, 'Engendering (In)security in Peace Support Operations' (2004) 35 (4) *Security Dialogue* 481-498; S. Whitworth, *Men, Militarism, and UN Peacekeeping*, (Lynne Rienner Publishers, London 2004); P. Higate, 'Peacekeepers, Masculinities and Sexual Exploitation' (2007) 10 (1) *Men and Masculinities* 99-119; P. Higate, 'Revealing the soldier: Peacekeeping and prostitution', in Herdt and Howe (eds.), *21st Century Sexualities*, (Routledge, 2007), 198-202.

⁹ K.H.S. Moon, *Sex among Allies: Military Prostitution in U.S.-Korea Relations*, (Columbia University Press, New York 1997); R. Schaffer, 'Sex among Allies: Military Prostitution in U.S.-Korea Relations' (1999) 10 (2) *Journal of World History* 499-502; I. Talleyrand, 'Military Prostitution: How the Authorities Worldwide Aid and Abet International Trafficking in Women' (2000) 27 *Syracuse Journal of International Law & Commerce* 151-176; E.N. Chang, 'Engagement Abroad: Enlisted Men, U.S. Military Policy and the Sex Industry' (2001) 15 *Notre Dame Journal of Law, Ethics & Public Policy* 621-653; J.S. Goldstein, *War and Gender: How Gender Shapes the War System and Vice Versa*, (Cambridge University Press, Cambridge 2001); K. Ziegler, 'Challenges

is written with the aim of criticising the governments and organisations involved, by revealing the misconduct of personnel whilst engaged in serving abroad.

Within the UN itself, the Secretariat has issued a number of reports and regulations, and the General Assembly has adopted resolutions that address the issue of SEA in PSOs, as well as misconduct and discipline in general. There have been some publications since the UN has begun to take action to prevent and prohibit SEA. Such papers critique different aspects of the UN actions.¹⁰ Other research in the field considers specific problem areas such as the application of international humanitarian law (IHL) to PSOs;¹¹ or military command or discipline in missions.¹² The application of human rights in

of Peace Operations: Into the 21st Century, Report on the VIII Seminar Human Rights and Gender Issues in Peacekeeping' (Pearson Peacekeeping Centre, Cornwallis, Nova Scotia, Canada, 28 May-1 June 2001) ; K.J. Allred, 'Human Trafficking: Breaking the Military Link' (2005) IV (4) *The Quarterly Journal* 64-72; Martin, *supra* note 6; V. Kent, 'Protecting civilians from UN peacekeepers and humanitarian workers: Sexual exploitation and abuse', in Aoi, et al. (eds.), *Unintended Consequences of Peacekeeping*, (United Nations University Press, Tokyo, New York, Paris 2007), 44-66.

¹⁰ R. Murphy, 'An Assessment of UN Efforts to Address Sexual Misconduct by Peacekeeping Personnel' (2006) 13 (4) *International Peacekeeping* 531-546; D. Otto, 'Making sense of zero tolerance policies in peacekeeping sexual economies', in Munro and Stychin (eds.), *Sexuality and the Law: Feminist Engagements*, (Glasshouse Press, London 2007), 259-282; N. Quéniwet, 'The Dissonance between the United Nations Zero-Tolerance Policy and the Criminalisation of Sexual Offences on the International Level' (2007) 7 *International Criminal Law Review* 657-676; M. Ndulo, 'The United Nations Responses To The Sexual Abuse And Exploitation Of Women And Girls By Peacekeepers During Peacekeeping Missions' (2009) 27 (1) *Berkeley Journal of International Law* 127-161; O. Simic, 'Rethinking 'sexual exploitation' in UN peacekeeping operations' (2009) 32 *Women's Studies International Forum* 288-295.

¹¹ U. Palwankar, 'Applicability of international humanitarian law to United Nations peace-keeping forces' (1993) (294) *International Review of the Red Cross* 227-240; B.D. Tittmore, 'Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations' (1997) 33 *Stanford Journal of International Law* 61-117; C. Greenwood, 'International Humanitarian Law and United Nations Military Operations' (1998) 1 *Yearbook of International Humanitarian Law* 3-34; M. Zwanenburg, 'Double Standards in Peacekeeping? Subcontracting Peacekeeping and International Humanitarian Law' (1999) 12 *Leiden Journal of International Law* 753-757; R. Murphy, 'International humanitarian law training for multinational peace support operations- lessons from experience' (2000) (840) *International Review of the Red Cross* 953-968; D. Shrager, 'UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage' (2000) 94 (2) *American Journal of International Law* 406-412; R. Murphy, 'United Nations Military Operations and International Humanitarian Law' (2003) 14 *Criminal Law Forum* 153-194; A. Faite and J.L. Grenier (eds.), *Expert Meeting on Multinational Peace Operations: Applicability of International Humanitarian Law and International Human Rights Law to UN Mandated Forces*, (International Committee of the Red Cross, Geneva 2004); 'Application of international humanitarian law and international human rights law to UN-mandated forces: Report on the Expert meeting on multinational peace operations' (2004) 86 (853) *International Review of the Red Cross* 207-212; G. Porretto and S. Vité, 'The application of international humanitarian law and human rights law to international organisations' (University Centre for International Humanitarian Law, Geneva, 2006) 1.

¹² J.W. Houck, 'The Command and Control of United Nations Forces in the Era of "Peace Enforcement"' (1993-1994) 4 *Duke Journal of Comparative and International Law* 1-69; H. McCoubrey and N.D. White, *The Blue Helmets: Legal Regulation of United Nations Military Operations*, (Dartmouth Publishing Company Limited, Aldershot 1996); R. Murphy, 'Legal Framework of UN Forces and Issues of Command and Control of Canadian and Irish Forces' (1999) 4 *Journal of Armed Conflict Law* 41-73; P. Rowe, 'Maintaining Discipline in United Nations Peace Support Operations: The Legal Quagmire for Military Contingents' (2000) 5 (1) *Journal of Conflict and Security Law* 45-62.

peace operations¹³ is an issue that is conflated with the extraterritorial application of human rights in general,¹⁴ particularly since case law developments in the European Court of Human Rights.¹⁵

There is little to no literature dealing with domestic criminal law capabilities to prosecute peacekeeping personnel. Some discussion exists on the ability of the United States to exercise extraterritorial jurisdiction over civilians accompanying the military abroad,¹⁶ and there is case law with regard to extraterritorial jurisdiction in both Australian and United States law.¹⁷ There is a lot of literature on US military law in general, including criticism of the US war crimes legislation.¹⁸ A

¹³ Murphy, 'IHL Training', *supra* note 11; M. Katayanagi, *Human Rights Functions of United Nations Peacekeeping Operations*, (Martinus Nijhoff Publishers, The Hague 2002); K. Månsson, 'Integration of Human Rights in Peace Operations: Is There An Ideal Model?' (2006) 13 (4) *International Peacekeeping* 547-563; R. Murphy and K. Månsson, 'Perspectives on Peace Operations and Human Rights' (2006) 13 (4) *International Peacekeeping* 457-461; Poretto and Vit  , *supra* note 11; T. Howland, 'Peacekeeping and Conformity with Human Rights Law: How MINUSTAH Falls Short in Haiti' (2006) 13 (4) *International Peacekeeping* 462-476; J. Cerone, 'Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations' (2006) 39 *Vanderbilt Journal of Transnational Law* 1447-1510; P. Rowe, *The Impact of Human Rights Law on Armed Forces*, (Cambridge University Press, Cambridge 2006); P. Rowe, 'Do Soldiers Really Have to Apply Human Rights Law in Military Operations?' (United Nations Association, Westminster Branch, 16 May 2006) ; K. Starmer, 'Responsibility for troops abroad: UN mandated forces and issues of human rights accountability' (2008) (3) *European Human Rights Law Review* ; F. Messineo, 'The House of Lords in Al-Jedda and Public International Law: Attribution of Conduct to UN-Authorized Forces and the Power of the Security Council to Displace Human Rights' (2009) 56 (1) *Netherlands International Law Review* 35-62.

¹⁴ K.M. Meessen (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, (Kluwer Law International, London 1996); K. Altiparmak, 'Bankovic: An Obstacle to the Application of the European Convention on Human Rights in Iraq?' (2004) 9 (2) *Journal of Conflict and Security Law* 213-251; F. Coomans and M.T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*, (Intersentia, Antwerp-Oxford 2004); R. Wilde, 'Legal "Black Hole"? Extraterritorial State Action and International Treaty Law on Civil and Political Rights' (2004-2005) 26 *Michigan Journal of International Law* 739-806; K. Altiparmak, 'European Convention on Human Rights: Extra-territorial Application' (2005) 69 *Journal of Criminal Law* 295-301; J. Cerone, 'The Application of Regional Human Rights Law Beyond Regional Frontiers: The Inter-American Commission on Human Rights and US Activities in Iraq' (2005) *ASIL Insight* ; S. Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention' (2010) 20 (4) *European Journal of International Law* 1223-1246.

¹⁵ Discussed *infra* in Chapter 2.

¹⁶ See e.g. M.S.S. Gibson, 'Lack of Extraterritorial Jurisdiction Over Civilians: A New Look at an Old Problem' (1995) 148 *Military Law Review* 114-185; C.G.R. Schmitt, 'The Military Extraterritorial Jurisdiction Act: The Continuing Problem of Criminal Jurisdiction Over Civilians Accompanying the Armed Forces Abroad- Problem Solved?' (2000) *The Army Lawyer* 1-10; F.A. Stein, 'Have We Closed the Barn Door Yet? A Look at the Current Loopholes in the Military Extraterritorial Jurisdiction Act' (2005) 27 *Houston Journal of International Law* 579-607; M.G.R. Schmitt, 'Amending the Military Extraterritorial Jurisdiction Act of 2000: Rushing to Close an Unforeseen Loophole' (2005) *The Army Lawyer* 41-47.

¹⁷ See Chapter 4.

¹⁸ F.A. Gilligan and F.I. Lederer, *Court-Martial Procedure*, 2nd ed., Vol. 1, (Lexis Law Publishing, Charlottesville, Virginia 1999); D. Cassel, 'The ICC's New Legal Landscape: The Need to Expand U.S. Domestic Jurisdiction to Prosecute Genocide, War Crimes, and Crimes Against Humanity' (1999-2000) 23 *Fordham International Law Journal* 378-397; C.M.E. Eichelman, 'International Criminal Jurisdiction Issues for the United States Military' (2000) *The Army Lawyer* 23-32; D. Cassel, 'Empowering United States Courts to Hear Crimes Within the Jurisdiction of the International Criminal Court' (2001) 35 *New England Law Review* 421-445; M.S. Zaid, 'Will or Should the United States ever Prosecute War Criminals?: A Need for Greater

significant amount of commentary exists in this area due to the uneasy relationship between the US and the ICC, as the US is not a party to the Rome Statute and has sought to distance its personnel from any potential association with the ICC, with particular impact on peace operations.¹⁹

In the field of international criminal law, there is a wealth of sources in all formats available, due to the fact that this is a relatively new area of international law, and is constantly developing.²⁰ Analyses exist of all areas of international criminal law- including the *ad hoc* tribunals, the ICC, substantive law, procedural law, case law, history, and policy concerns.²¹

1.2. Research Question

This thesis seeks to determine the best jurisdiction for criminal accountability for peacekeeping personnel who engage in sexual exploitation and abuse, and other conduct amounting to violence

Expansion in the Areas of Both Criminal and Civil Liability' (2001) 35 *New England Law Review* 447-469; E. Talbot Jensen and J.J. Teixeira, 'Prosecuting Members of the U.S. Military for Wartime Environmental Crimes' (2005) XVII (4) *Georgetown International Environmental Law Review* 651-671; M.M.N. White, 'Charging War Crimes: A Primer for the Practitioner' (2006) *The Army Lawyer* 1-11; T.W. Pittman and M. Heaphy, 'Does the United States Really Prosecute Its Service Members for War Crimes? Implications for Complementarity before the International Criminal Court' (2008) 21 *Leiden Journal of International Law* 165-183.

¹⁹ M. Morris, 'High Crimes and Misconceptions: The ICC and Non-Party States', in Shelton (ed.), *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court*, (Transnational Publishers, Inc., Ardsley, New York 2000), 219-279; J. Paust, 'The Reach of ICC Jurisdiction Over Non-Signatory Nationals' (2000) 33 (1) *Vanderbilt Journal of Transnational Law* 1-11; S.D. Murphy, 'Efforts to Gain Immunity from ICC for U.S. Peacekeepers' (2002) 96 *American Journal of International Law* 725-729; C.M.V.d. Kieft, 'Uncertain Risk: The United States Military and the International Criminal Court' (2002) 23 *Cardozo Law Review* 2325-2368; 'Efforts to Obtain Immunity from ICC for U.S. Peacekeepers' (2002) 96 (3) *American Journal of International Law* 725-729; 'American Servicemembers' Protection Act' (2002) 96 (4) *American Journal of International Law* 975-977; M.T. Johnson, 'The American Servicemembers' Protection Act: Protecting Whom?' (2003) 43 *Virginia Journal of International Law* 405-484; L.J. Faulhaber, 'American Servicemembers' Protection Act of 2002' (2003) 40 (2) *Harvard Journal on Legislation* 537-557; S. Zappala, 'Are Some Peacekeepers Better Than Others? UN Security Council Resolution 1497 (2003) and the ICC' (2003) 1 *Journal of International Criminal Justice* 671-678; M.E. Lantto, 'The United States and the International Criminal Court: A Permanent Divide?' (2008) 31 *Suffolk Transnational Law Review* 649-646; S.W. Risch, 'Hostile Outsider or Influential Insider? The United States and the International Criminal Court' (2009) *May Army Lawyer* 61-89.

²⁰ See e.g. W.A. Schabas, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone*, (Cambridge University Press, Cambridge 2006); R. Cryer, et al., *An Introduction to International Criminal Law and Procedure*, (Cambridge University Press, Cambridge 2007); W.A. Schabas, *An Introduction to the International Criminal Court*, 3rd ed., (Cambridge University Press, Cambridge 2007).

²¹ For general texts, see e.g. *ibid.*; M.C. Bassiouni (ed.), *International Criminal Law Volume I Crimes*, (Transnational Publishers, Inc., Ardsley, New York 1999); M.C. Bassiouni (ed.), *International Criminal Law Volume II Procedural and Enforcement Mechanisms*, 2nd ed., (Transnational Publishers, Inc., Ardsley, New York 1999); A. Cassese, et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary Volume II*, (Oxford University Press, Oxford 2002); K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, (Cambridge University Press, Cambridge 2002); M.C. Bassiouni, *Introduction to International Criminal Law*, (Transnational Publishers, Inc., Ardsley, New York 2003); A. Cassese, *International Criminal Law*, 2nd ed., (Oxford University Press, Oxford 2008); G. Werle, *Principles of International Criminal Law*, 2nd ed., (T.M.C. Asser Press, The Hague 2009).

against women. As criminalisation is sought as the appropriate method, it is first examined why criminalisation is necessary. The impact of sexual exploitation and abuse on women in the territories in which PSOs are located is detailed as harms in the form of violations of the rights of these women. Alternatives to criminal sanctions are then considered, in particular the actions of the UN in prevention and prohibition of SEA. While such regulations are considered to be necessary, they are ultimately inadequate in preventing and punishing SEA. Included is an assessment of the Draft Convention on Criminal Accountability of UN Officials and Experts on Mission, the adoption of which would support criminalisation.

However, the UN itself is unable to exercise criminal jurisdiction, and thus it is essential to examine what jurisdictions would be most effective in undertaking criminal prosecution of peacekeeping personnel. The choice between national jurisdictions and international criminal justice is debated. Which jurisdiction offers a more effective forum for ensuring accountability? What potential impediments exist and how can such hindrances can be overcome?

This thesis will argue that gender-based crimes by peacekeepers should be criminalised, and that, while the International Criminal Court should not be discounted as a potential forum for prosecuting perpetrators, domestic prosecutions are more likely and more effective.

1.3. *Methodology*

This thesis is doctrinal and theoretical in its orientation and is designed to be able to be applied so that it will be useful in the field of ensuring accountability for peace operation personnel for misconduct. Several different areas of law contribute to the research, namely public international law, and the subsets of public international law of international criminal law, international humanitarian law, and international human rights law; and domestic criminal law and military law (particularly military disciplinary law).

The main methodology used in Chapter 2 is international feminist legal theory. The direction of the remainder of the thesis is influenced by such thinking, with particular motivation from the writings of

authors such as Charlesworth, Chinkin, and MacKinnon.²² The theoretical approach does not aim to fall into a fixed feminist category such as radical, liberal, socialist, or postmodern.²³ Instead the international legal feminist approach is followed. This view seeks to recognise not only the need for violations of the rights of women to be avoided and punished, but to demonstrate the impact of intersectionality on women- that is, the impact of characteristics such as race, religion and ethnicity as well as gender, for women.²⁴ The aim is to find a solution for the violations of women's rights that result from the commission of violence against women such as sexual exploitation and abuse, by peacekeeping personnel, through challenging the gendered system of international law,²⁵ and by shifting the emphasis from the survivors of violence to the male perpetrators.²⁶ This is particularly relevant in the context of military operations, given the dominance of the masculine in the military.²⁷

In addition, socio-legal theory is used, particularly in Chapter 2, where the social ramifications of the conduct of peacekeeping personnel are presented as the reasoning behind the need for

²² H. Charlesworth, et al., 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613-645; H. Charlesworth, 'Alienating Oscar? Feminist Analysis of International Law' (1993) 25 *Stud. Transnational Legal Policy* 1-18; H. Charlesworth, 'Cries and Whispers: Responses to Feminist Scholarship in International Law' (1996) 65 *Nordic Journal of International Law* 557-568; H. Charlesworth, 'Feminist Methods in International Law' (1999) 93 *American Journal of International Law* 379-394; H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis*, (Manchester University Press, Manchester 2000). C.A. MacKinnon, *Feminism Unmodified*, (Harvard University Press, Cambridge, Mass., London 1987); C.A. MacKinnon, 'Prostitution and Civil Rights' (1993) 1 *Michigan Journal of Gender and Law* 13-31; C.A. MacKinnon, *Are Women Human? And Other International Dialogues*, (Belknap Press, Cambridge, Mass., London 2006); C.A. MacKinnon, 'Defining Rape Internationally: A Comment on Akayesu' (2006) 44 *Columbia Journal of Transnational Law* 940-958; C.A. MacKinnon, 'The ICTR's Legacy on Sexual Violence' (2008) 14 *New England Journal of International and Comparative Law* 101-110.

²³ Charlesworth, 'Feminist Methods', *ibid*, p. 381; F.R. Teson, 'Feminism and International Law: A Reply' (1992-1993) 33 *Virginia Journal of International Law* 647-684; M. Zalewski, *Feminism after Postmodernism: Theorising Through Practice*, (Routledge, Florence, KY, USA 2000), pp. 12-28.; R.C. Preston and R.Z. Ahrens, 'United Nations Convention Documents in Light of Feminist Theory' (2001-2002) 8 *Michigan Journal of Gender and Law* 1-43, pp. 7-10.

²⁴ *Ibid*. See also M. Minow, 'Beyond Universality' (1989) *University of Chicago Legal Forum* 115-138; K. Engle, 'International Human Rights and Feminism: When Discourses Meet' (1991-1992) 13 *Michigan Journal of International Law* 517- 610 See Chapter 2, Violence against women.

²⁵ Charlesworth et al., *supra* note 22, p. 615.

²⁶ G. Allwood, *French Feminisms: Gender and violence in contemporary theory*, (UCL Press Limited, London 1998), pp. 119-133.

²⁷ C. Enloe, *Does Khaki Become You? The Militarization of Women's Lives*, First ed., (South End Press, London 1983); C. Marshall, et al., *Militarism versus Feminism: Writings on Women and War*, (Virago Press Limited, London 1987); C.L. Williams, *Gender Differences at Work: Women and Men in Nontraditional Occupations*, (University of California Press, Berkeley 1989); Whitworth, *supra* note 8; P. Higate, 'Peacekeeping and Gendered Relations', *Peace & Conflict Monitor*, (2003); P. Higate (ed.), *Military Masculinities: Identity and the State*, (Praeger, Westport CT 2003); Higate, 'Peacekeepers, Masculinities', *supra* note 8; M. Alison, 'Wartime sexual violence: women's human rights and questions of masculinity' (2007) 33 *Review of International Studies* 75-90; C. Duncanson, 'Forces for Good? Narratives of Military Masculinity in Peacekeeping Operations' (2009) 11 (1) *International Feminist Journal of Politics* 63-80.

criminalisation. The social impact of violent behaviour is an important consideration in criminalisation, as according to such theory the purpose of criminal law is to prevent and punish social harms.²⁸

Chapter 4 takes both a doctrinal and comparative approach. Legislative and case law of Australia and the United States are examined. These two jurisdictions were selected due to the participation of those states in PSOs, and also because the two states have Anglo common law legal systems (or Anglo-American legal culture, as it has come to be known).²⁹ Both states' legal systems were originally based on the Anglo system of law; and both are federations with a separation of state and federal laws.³⁰ It is interesting to note the diverse developments in each system over the hundreds of years since their establishment, including domestic legislation and statutory interpretation, the ideological concepts of law, and the observance and application of international law within the domestic systems.³¹

An empirical study was not undertaken for this thesis due to the fact that there is sufficient empirical data available on the basis of which a classical doctrinal analysis could be undertaken. There was a need for analysis of the relevant documents (instruments, regulations, etc), to explore different aspects of regulation of peacekeepers at national and international levels.

1.3.1. Definitions

It is important to clarify definitions of words and phrases that will be commonly used throughout this thesis. The term 'peacekeeping personnel' or word 'peacekeepers' will be used to refer to the

²⁸ J. Herring, *Criminal Law*, 3rd ed., (Oxford University Press, Oxford 2008), p. 2; L. May, *Crimes Against Humanity: A Normative Account*, (Cambridge University Press, Cambridge 2005), pp. 80-90.

²⁹ D. Nelken, 'Doing Research Into Comparative Criminal Justice', in Banakar and Travers (eds.), *Theory and Method in Socio-Legal Research*, (Hart Publishing, Oxford, Portland Oregon 2005), 245-258, pp. 245-6.

³⁰ E.A. Farnsworth, *An Introduction to the Legal System of the United States*, (Oceana Publications, Dobbs Ferry NY 1996); G. Carney, *The constitutional systems of the Australian states and territories*, (Cambridge University Press, Cambridge 2006).

³¹ See e.g. B. Van Schaack, 'International Law in the United States Legal System: Observance, Application, and Enforcement' (2005) 45 *Santa Clara Law Review* 807-815; F. Valdes, 'Whats the Fuss? Constitutionalism, Internationalism, and Original Method' (2007) 3 (1) *Florida International University Law Review* 1-26. See also Australian Year Book of International Law; American Journal of International Law.

military personnel and those civilians who fall under military jurisdiction when deployed as part of a mission.

With respect to UN missions, there are several different terms that are used, such as peacekeeping operation and peace support operation. Peacekeeping was never defined or addressed by the UN Charter, and the concept itself has evolved over the years to include missions that keep peace, support peace, enforce peace, build peace, and many other roles such as disarmament, de-mining, and transitional administration.³² In this thesis, the term ‘peace support operation’ (PSO) or ‘mission’ will be used, and will encompass all varieties of missions.³³

In addition, it is necessary to define what is meant by ‘gender-based crimes’ as it is applied in this thesis. In general, ‘gender-based crimes’ are crimes committed against a person because of that person’s actual or perceived gender. Similarly, ‘gender-based violence’ is violence committed against a person because of that person’s gender. The Declaration on the Elimination of Violence against Women defines violence against women as “any act of gender-based violence that results in, or is likely to result in, physical, sexual or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life”.³⁴ ‘Sex’ and ‘gender’ must be differentiated. ‘Sex’ refers to the biological and physiological characteristics that define men and women. ‘Gender’ refers to the socially constructed roles, behaviours, activities,

³² H. McCoubrey and N.D. White, *The Blue Helmets: Legal Regulation of United Nations Military Operations*, (Dartmouth Publishing Company Limited, Aldershot 1996), pp. 1-10; M.P. Karns and K.A. Mingst, ‘Peacekeeping and the changing role of the United Nations: Four dilemmas’, in Thakur and Schnabel (eds.), *United Nations peacekeeping operations: Ad hoc missions, permanent engagement*, (United Nations University Press, Tokyo, New York, Paris 2001), 215-237; A. Schnabel and R. Thakur, ‘From An Agenda for Peace to the Brahimi Report: Towards a new era of UN peace operations?’, in Thakur and Schnabel (eds.), *United Nations peacekeeping operations: Ad hoc mission, permanent engagement*, (United Nations University Press, Tokyo, New York, Paris 2001), 238-255; *Gender Resource Package for Peacekeeping Operations*, (United Nations Department of Peacekeeping Operations, New York 2004), A. Schnabel and R. Thakur, ‘From An Agenda for Peace to the Brahimi Report: Towards a new era of UN peace operations?’, in Thakur and Schnabel (eds.), *United Nations peacekeeping operations: Ad hoc mission, permanent engagement*, (United Nations University Press, Tokyo, New York, Paris 2001), 238-255p. ix; *Gender Resource Package for Peacekeeping Operations*, (United Nations Department of Peacekeeping Operations, New York 2004); B.F. Klappe, ‘International Peace Operations’, in Fleck (ed.), *The Handbook of International Humanitarian Law*, 2nd ed., (Oxford University Press, Oxford 2008), 635-673p. 635.

³³ ‘Peace support operation’ is used by other scholars as a generic term, e.g. Rowe, ‘Maintaining Discipline’, *supra* note 12; Murphy, ‘UN Military Operations and IHL’, *supra* note 11; as is ‘mission’, e.g. Murphy, ‘Legal Framework’, *supra* note 12. Others use ‘peace operations’ or ‘peacekeeping operations’; e.g. Tittmore, *supra* note 11; Shrager, *supra* note 11.

³⁴ Declaration on the Elimination of Violence against Women, A/RES/48/104, 23 February 1994.

and attributes; the social differences and social relations between men and women.³⁵ In this thesis, 'gender-based' will not be used in the general sense.³⁶ It will refer specifically to violence or crime committed against women, and the particular categories of violence/crimes examined will be sexual exploitation, rape, sexual slavery, and prostitution-related activities. Related offences such as trafficking and HIV-related offences will be considered in the context of these other crimes.

Analysis of crimes against women will be undertaken as the majority of victims of sexual exploitation and abuse, rape, sexual slavery, and prostitution-related activities are women. Women have distinct experiences during and after armed conflict.³⁷ While not all violence against women has a sexual element, sexual violence figures largely in women's experiences of armed conflict.³⁸ Those particular crimes have been selected as they have been committed by peacekeepers, and they are crimes that are targeted at women.³⁹ Rape and sexual slavery are commonly criminalised. Hence, particular prominence will be given to sexual exploitation and prostitution-related activities, as they are presently not commonly criminalised, as will be demonstrated throughout the thesis. Specific definitions of crimes will be detailed in later chapters.

1.3.2. Emphasis on UN Peace Support Operations and Military Personnel

In undertaking the analysis of potential solutions for the commission of gender-based crimes by peacekeepers, this thesis will only analyse criminal jurisdiction over military personnel involved in UN PSOs. It is understood that there are many multi-national missions deployed throughout the globe by organisations other than the UN, such as the North Atlantic Treaty Organization (NATO), the

³⁵ *Gender Resource Package for Peacekeeping Operations*, (United Nations Department of Peacekeeping Operations, New York 2004), p. 1. *See also* Concepts and Definitions, Office of the Special Adviser on Gender Issues and Advancement of Women, Department of Economic and Social Affairs, <http://www.un.org/womenwatch/osagi/conceptsanddefinitions.htm>.

³⁶ "[T]he term 'gender-based' provides a new context for understanding violence against women because it reflects the unequal power relationship between women and men in society. This does not mean that all acts against a woman are gender-based violence, or that all victims of gender-based violence are female." 'Africa-Asia: Gender-based violence: A silent, vicious epidemic', *IRIN NEWS*, (1 September 2004)

³⁷ J. Gardam and M. Jarvis, *Women, Armed Conflict and International Law*, (Kluwer Law International, The Hague 2001), pp. 19-51.

³⁸ *Ibid.*, pp. 25-30; Report of the Secretary-General pursuant to Security Council resolution 1820 (2008), S/2009/362, 20 August 2009.

³⁹ Special measures for protection from sexual exploitation and sexual abuse, Report of the Secretary General, A/59/782 (2005), A/60/861 (2006), A/61/957 (2007), A/62/890 (2008), A/63/720 (2009).

Economic Community of West African States (ECOWAS) using the Economic Community of West African States Monitoring Group (ECOMOG), and the African Union (AU).⁴⁰ However, only UN missions will be considered. This choice is due in part to the large number of UN missions worldwide,⁴¹ the size of UN missions, and to the fact that the UN has been taking action with regard to sexual exploitation and abuse by mission personnel, hence resulting in an availability of resources to analyse.⁴² The involvement of other organisations in military peace support operations is far more limited, for example NATO in Kosovo (KFOR) and Afghanistan (ISAF); ECOMOG in Liberia, Sierra Leone and Guinea-Bissau; and the AU, currently in Sudan as part of UNAMID.⁴³ These missions can be subsumed by a larger UN mission, or are established as a small mission to take over once the mandate of a larger UN mission has been completed.⁴⁴

While this thesis recognises that within UN missions, UN civilian staff forms part of a PSO, only law applicable to military personnel will be examined. The first of two reasons for this selection is the fact that UN reports show that the overwhelming majority of allegations of sexual exploitation and abuse are against peacekeeping personnel, and the majority of those against military personnel. In 2004, there were 121 total allegations; 105 of those were Department of Peacekeeping Operations (DPKO) personnel, 80 of whom were military personnel.⁴⁵ In 2005, allegations totalled 373, with 340 being against DPKO personnel, 193 of which were against military personnel.⁴⁶ After 2005, statistical reporting methods changed in the Reports of the Secretary-General, giving numbers of allegations in completed investigations only. Military personnel still represent the largest group against whom

⁴⁰ E.g. NATO- KFOR (Kosovo); ECOMOG- Liberia; AU- AMIS (Sudan).

⁴¹ For current operations on five continents, see <http://www.un.org/Depts/dpko/dpko/currentops.shtml>.

⁴² See Chapter 3.

⁴³ African Union-United Nations Hybrid Operation in Darfur.

⁴⁴ E.g. ECOWAS in Sierra Leone and Liberia was succeeded by UN mission UNAMSIL and UNMIL; C. Ero, 'ECOWAS and the Subregional Peacekeeping in Liberia' (1995) *Journal of Humanitarian Assistance*; T. Ajayi, 'The UN, the AU and ECOWAS – A Triangle for Peace and Security in West Africa?' (Freidrich Ebert Stiftung, New York, November 2008)

⁴⁵ Special Measures for protection from sexual exploitation and abuse: Report of the Secretary-General, A/59/782, 15 April 2005, Annex I Nature of allegations, by United Nations entity and category of personnel, 1 January- 31 December 2004.

⁴⁶ Special Measures for protection from sexual exploitation and abuse: Report of the Secretary-General, A/60/861, 24 May 2006, Annex I Nature of allegations, by United Nations entity and category of personnel, 1 January- 31 December 2005.

investigations were conducted. In 2006, 66 out of 82 DPKO investigations involved military personnel;⁴⁷ in 2007 it was 118 out of 136;⁴⁸ and in 2008, 61 out of 80.⁴⁹

1.3.2.1. Military is a 'special community'

The second reason for choosing to address only military personnel is the distinctive culture of the military. The 'special community' that exists to distinguish military life from civilian life means that different rules apply to military personnel. This is relevant to the choice of military in this thesis because they are subject to a different, stricter standard of behaviour than civilians. Militaries have unique disciplinary systems, designed to be applicable in situations distinct from ordinary daily life, such as serving abroad in a PSO. Given that the majority of personnel in a mission are military, it is appropriate to gain an understanding of the military system of justice. This presentation of the military as a 'special community' will be undertaken in the context of Australian and US military law, the two states whose laws will be examined in Chapter 4.

As will be discussed throughout this thesis, military personnel in a PSO are under the jurisdiction of their sending state. If a state tries its own military nationals, it is generally likely to be in a military court.⁵⁰ This is principally because the military has a separate goal other than simply punishment when it takes disciplinary action. The military prefers to regulate and discipline its own in order to maintain the required sense of discipline and obedience, and thus functionality, of the armed forces. Militaries have adopted the court-martial as a method of trying their own personnel.⁵¹ The Manual for Courts-Martial United States defines the purpose of military law:

⁴⁷ Special Measures for protection from sexual exploitation and abuse: Report of the Secretary-General, A/61/957, 15 June 2007, Annex V Status of investigations reported in 2006, for personnel of the Department of Peacekeeping Operations, 1 January- 31 December 2006. Note number of investigations does not correlate to number of allegations received, which totalled 357.

⁴⁸ Special Measures for protection from sexual exploitation and abuse: Report of the Secretary-General, A/62/890, 25 June 2008, Annex V Status of investigations conducted in 2007 involving personnel of the Department of Peacekeeping Operations, 1 January- 31 December 2007.

⁴⁹ Special Measures for protection from sexual exploitation and abuse: Report of the Secretary-General, A/63/720, 17 February 2009, Annex VI Status of investigations into allegations involving peacekeeping personnel reported in 2008 and their follow-up. Statistics for 2009 were not available as of February 2010.

⁵⁰ D.A. Schlueter, 'The Court-Martial: An Historical Survey' (1980) 87 *Military Law Review* 129-166.

⁵¹ *Ibid.*

“The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.”⁵²

Likewise, the United Kingdom states that “[t]he principal object of military law is to maintain order and discipline amongst members of the Army and, in certain circumstances, those who accompany them”.⁵³ Countries such as the United Kingdom and the United States have a long history of military justice systems, designed to investigate and discipline offences relating to the armed forces.⁵⁴ This is also based on jurisdictional reasoning: civilian criminal jurisdiction is generally only territorial, whereas military jurisdiction functions extraterritorially in order to maintain discipline when personnel are serving overseas. This includes the court-martials themselves, which are able to be convened in any location.⁵⁵ This ability to hold courts-martial closer to the territory of the crime is more convenient, efficient and economical, due to ease of access to witnesses and evidence.

Some of the criminal provisions examined in this chapter are restrictions on behaviour imposed through military law that would be seen as a violation of rights, such as freedom of association, in civilian law. However, in both Australian and United States case law they have been held to be constitutional in a military context, against challenges that have proclaimed these restrictions to be violations of constitutional rights such as freedom of speech.⁵⁶

While these military-specific laws may seem restrictive,⁵⁷ such laws certainly work in favour of the ability to restrict military personnel from engaging in behaviour such as sexual exploitation and abuse, engaging the services of a prostitute, visiting brothels or strip clubs, and trafficking, whilst engaged in a PSO. Some areas which in non-military life fall under more societal regulation (i.e. what

⁵² Manual for Courts-Martial United States (2008 Edition), Part I Preamble, 3. Nature and purpose of military law, at <http://www.au.af.mil/au/awc/awcgate/law/mcm.pdf>.

⁵³ United Kingdom Army, Serving Soldier, *Discipline and Military Law- Introduction* at http://www.army.mod.uk/servingsoldier/termsofserv/discmillaw/intro/ss_hrpers_disc_intro_w.html.

⁵⁴ C.H.B. Garraway, 'Editorial Comment: Abu Ghraib- Another Black Hole? Military Excesses? Is There a 'Right Way' of Dealing?' (2004) 2 *Journal of International Criminal Justice* 981-987, pp. 982-3.

⁵⁵ Manual for Courts-Martial United States (2008 Edition), Part II Rules for Courts-Martial, Chapter II Jurisdiction, R.C.M. 201(a)(3).

⁵⁶ US: *Parker v Levy* 417 U.S. 733 (1974); *Able v United States*, 155 F.3d 628 (2nd Cir. 1998). Aust: *Re Tracey; Ex parte Ryan* [1989] HCA 12; (1989) 166 CLR 518 (10 February 1989); *McWaters v Day* [1989] HCA 59; (1989) 168 CLR 289 (5 December 1989).

⁵⁷ The author is not aiming to comment on this, but rather simply seeking to use the law as it exists.

is seen as morally reprehensible or generally unacceptable behaviour), in the military fall under the jurisdiction of the law.⁵⁸

President Wilson described the nature of the special community and the reason for discipline as follows:

“The purpose of the Articles of War [now the UCMJ] in times of peace is to bring about a uniformity in the application of military discipline which will make the entire organization coherent and effective, and to engender a spirit of cooperation and proper subordination to authority which will in time of war instantly make the entire Army a unit in its purpose of self-sacrifice and devotion to duty in the national defense.”⁵⁹

The Second Circuit Court in *Able v United States* referred to the specialised community, and held:

“Moreover, in the military context, the Court has recognized that “the essence of military service ‘the subordination of the desires and interests of the individual to the needs of the service.’” *Justice is afforded on different terms than is found in civilian life because the military is a “specialized community governed by a separate discipline.”*”⁶⁰

The Court in *Able* offered a detailed discussion of the distinctive aspects of military life, and thus the requirement of a unique disciplinary system.

“Military life is fundamentally different from civilian life in that... the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society; and... the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society...

“The pervasive application of the standards of conduct is necessary because members of the armed forces must be ready at all times for worldwide deployment to a combat environment.

“The worldwide deployment of United States military forces, the international responsibilities of the United States, and the potential for involvement of the armed forces in actual combat routinely make it necessary for members of the armed forces involuntarily to accept living

⁵⁸ See Mill’s concept of law jurisdiction and society jurisdiction, discussed in J. Schonsheck, *On Criminalization: An Essay in the Philosophy of the Criminal Law*, Vol. 19, (Kluwer Academic Publishers, Dordrecht/Boston/London 1994), p. 58.

⁵⁹ *United States v Hooper*, 9 U.S.C.M.A. 637 (1958) at 644, citing President Wilson, 53 Congressional Record 12844. Hooper was charged with conduct unbecoming for sodomy and “publicly associate[ing] with persons known to be sexual deviates, to the disgrace of the armed forces”. *Ibid.*, at 646-7.

⁶⁰ *Able v United States*, 155 F.3d 628 (2nd Cir. 1998) at 632 and 633. Emphasis added.

conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.

“The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.”⁶¹

There has also been discussion in Australian law concerning the application of both military and civil criminal legislation to Australian Defence Force (ADF) personnel. In contrast to the US military, the majority of criminal offences that ADF personnel are subject to are found in civil criminal legislation. Yet there is still an emphasis on the special circumstances of the military. The *Defence Force Discipline Act* (DFDA)⁶² contains only a limited number of offences that are specific to the military context, and referred to as service offences. The application of the two laws is based on the reconciliation of “two sets of constitutional objectives”.⁶³ One of these sets of objectives is

“the defence of the Commonwealth and of the several States and the control of the armed forces. To achieve these objectives, it is appropriate to repose in service authorities a broad authority, to be exercised according to the exigencies of time, place and circumstance, to impose discipline on defence members and defence civilians. The second set of objectives... consist of recognition of the pre-ordinate jurisdiction of the civil courts and the protection of civil rights which those courts assure alike to civilians and to defence members and defence civilians who are charged with criminal offences. To achieve these objectives, civil jurisdiction should be exercised when it can conveniently and appropriately be invoked and the jurisdiction of service tribunals should not be invoked, except for the purpose of maintaining or enforcing service discipline... proceedings may be brought against a defence member or a defence civilian for a service offence if, but only if, those proceedings can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline.”⁶⁴

This highlights the position of the military as a special community and demonstrates the reasoning behind the limited number of offences that are found within the DFDA. In *McWaters v Day*, the High Court of Australia held that “it is clear that the *Discipline Act* contemplates parallel systems of military and ordinary criminal law and does not evince any intention that defence force members

⁶¹ *Able*, at 635-636. The Court went on to find that the prohibition on acts constitutional, and therefore also the prohibition on statements.

⁶² *Defence Force Discipline Act* (Cth) 1982.

⁶³ *Re Tracey; Ex parte Ryan* [1989] HCA 12; (1989) 166 CLR 518 (10 February 1989), at 569.

⁶⁴ *Re Tracey* at 569-570, per Brennan and Toohey JJ.

enjoy an absolute immunity from liability under the ordinary criminal law”.⁶⁵ The issue has been addressed several times in the High Court, which has consistently determined the Constitutional⁶⁶ validity of applying both civil and military disciplinary law to defence personnel, as part of the “maintenance of good order and discipline in the defence forces”.

“It is open to Parliament to provide that any conduct which constitutes a civil offence shall constitute a service offence, if committed by a defence member. As already explained, the proscription of that conduct is relevant to the maintenance of good order and discipline in the defence forces. The power to proscribe such conduct on the part of defence members is but an instance of Parliament's power to regulate the defence forces and the conduct of the members of those forces. In exercising that power it is for Parliament to decide what it considers necessary and appropriate for the maintenance of good order and discipline in those forces. And Parliament's decision will prevail so long at any rate as the rule which it prescribes is sufficiently connected with the regulation of the forces and the good order and discipline of defence members.”⁶⁷

It is evident how important good order, conduct and discipline, and unit cohesion are to the military in order to ensure it functions to the best of its capacity. Hence we see that whether a state prefers to use specific military disciplinary law as the principal method of proscribing offensive conduct, as with the US UCMJ, or to use civil criminal law as the principal method, as in the case of the ADF, the emphasis is still on a specific form of conduct and discipline to be adhered to by military personnel due to the factors mentioned that render the military a ‘special community’. It is this unique ‘special community’ that creates an interesting focus group for the analysis in this thesis. The application of different laws can mean a different expected standard of behaviour, and certain conduct may be inappropriate that would otherwise be acceptable in an ordinary civilian context. Applying such laws ensure the efficacy of a PSO. Good order, conduct and discipline, and unit cohesion are essential for missions to operate efficiently and with full cooperation between national contingents.

⁶⁵ *McWaters v Day* [1989] HCA 59; (1989) 168 CLR 289 (5 December 1989) at 298.

⁶⁶ *Commonwealth of Australia Constitution Act* (the Constitution); s. 51(vi) confers upon Parliament the power to make laws in relation to “the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth”; and s. 51(xxix) confers the power to make laws in relation to external affairs.

⁶⁷ *Re Tracey* at 545 per Mason CJ, Wilson and Dawson JJ. Affirmed in *Re Colonel Aird; Ex-parte Alpert* [2004] HCA 44; 220 CLR 308; 209 ALR 311 at 545 per Gummow J.

This is not to ignore the existence of allegations against non-military personnel. One of the arguments in this thesis is that UN regulations and international instruments and agreements should be applicable to all categories of personnel. However, in the context of the UN, there are distinctive circumstances for different categories of personnel with regards to jurisdiction and immunity, and such differences are taken into account in the analysis.

Nor does this thesis seek to disregard the broader context of issues. For example, not all groups of women in different PSO regions are the same, but necessary limitations require a certain element of generalisation. Additionally, general discussion on prostitution will not be engaged in, as the thesis seeks to address prostitution-related activities only in the context of PSOs. Criminalisation is the solution advocated in this thesis, but cannot be ultimately successful without engagement in other aspects such as development, peace, and sustainability.⁶⁸

1.4. Importance of Research

The context of the research of this thesis has been outlined above. This thesis seeks to differentiate from other research by combining issues to address criminal accountability of peacekeepers for gender-based crimes against women. Rather than concentrating on one distinguishing legal concern, this thesis will demonstrate that the overall problem is distinctly complex. A comprehensive attempt to determine a solution cannot ignore the fact that there are numerous fields of concern: the impact of the conduct on the victims; immunities; jurisdictional multiplicities; domestic legal barriers; and restrictions of the Rome Statute of the ICC. This thesis makes a contribution by bringing together the fields of international criminal law, human rights, and international humanitarian law.

This thesis is divided into four main chapters. Chapter 2 looks at the criminalisation of violence against women by peacekeepers. After introducing general principles of criminalisation, specific reasons for criminalisation are considered, namely the fact that such violence constitutes a violation of the rights of the victims, and this violation amounts to harm committed against the victims. A

⁶⁸ D. Otto, 'Making sense of zero tolerance policies in peacekeeping sexual economies', in Munro and Stychin (eds.), *Sexuality and the Law: Feminist Engagements*, (Glasshouse Press, London 2007), 259-282.

spectrum of rights violated is addressed. In addition, the obligation of states under international law to criminalise violence against women is assessed, through case law and international instruments such as the Convention on the Elimination of All Forms of Discrimination against Women.⁶⁹ Yet the question of whether such obligations are applicable outside the territory of a state arises. Hence the extraterritoriality of human rights is analysed with specific reference to the application of case law in this area to peace support operations. Finally, Chapter 2 will examine the alternative forms of regulation, the code of conduct. This is the final principle of criminalisation, to seek an alternative form of regulation to criminalising the conduct in question.

A fresh approach is offered to examining the impact of sexual exploitation and prostitution on women, presenting the impact from a criminological perspective, as harms against women. These harms are characterised as rights violations, referenced to specific rights such as the right to health and the right to development. This analysis in itself is unique, in that it expressly examines *why* conduct such as sexual exploitation and abuse should be criminalised, rather than simply assuming it should be. In doing so it is also questioned whether non-criminal approaches are effective.

The thesis seeks to make a contribution to scholarship on the issue of the applicability of human rights in peace operations and the extraterritorial application of human rights. After engaging in a general analysis of international and regional case law on extraterritorial application of human rights, the case law is placed in the context of the conduct at issue in the thesis, and its direct applicability to violence against women by peacekeepers is examined.

Given that it is the behaviour of UN peacekeepers being addressed throughout this thesis, it is necessary to consider the actions of the UN towards preventing and punishing gender-based crimes committed by peacekeepers. Chapter 3 is devoted to an analysis of the prohibition and prevention of sexual exploitation and abuse in UN missions, as well as issues of jurisdiction, immunity, accountability, and cooperation or mutual legal assistance. All these issues have direct bearing on the

⁶⁹ Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 13, entered into force 3 September 1981.

potential for peacekeepers to be prosecuted for gender-based crimes. For example, is immunity an obstacle to prosecution? Which state has jurisdiction over personnel? How are peacekeepers to be held accountable, and how can states and the UN cooperate during investigations and prosecutions? These questions and others are addressed in Chapter 3.

This thesis is the first scholarly work to analyse the Draft Convention on Criminal Accountability for UN Officials and Experts on Mission.⁷⁰ The Draft Convention has been discussed in UN committees, but no research has been published critiquing the proposed provisions. While this thesis does not offer an analysis of every provision in the Draft Convention, the principal provisions are examined in Chapter 3, with recommendations made of potential improvements. The provisions examined deal with criminal accountability (both substantive law and mutual criminal legal assistance), immunity, and jurisdiction- themes that are also appraised elsewhere in this thesis in the context of national jurisdiction and the ICC.

Chapter 4 examines national jurisdiction over peacekeepers. As examples, the jurisdictions of Australia and the USA are used. These two jurisdictions were selected for a variety of reasons: linguistic accessibility; the fact that Australia and the US are both contributors to peace operations- Australia particularly with personnel and the United States being the largest financial contributor to missions. In addition, the two states have a similar legal heritage, but their laws have taken markedly differing directions, and an analysis of both states' laws with regard to the relevant gender-based crimes demonstrates this. There are two main areas of the states' laws that are examined. Firstly, jurisdiction; whether the states have enacted legislation to enable provisions to be enforced for crimes committed extraterritorially. Secondly, substantive law; whether each state has the necessary legislation in place, proscribing the particular crimes at issue in this thesis. Extraterritorial jurisdiction and substantive law are both essential for a state to have the ability to prosecute its own personnel

⁷⁰ Report of the Group of Legal Experts on ensuring accountability of United Nations staff and experts on mission with respect to criminal acts committed in peacekeeping operations, A/60/980, 16 August 2006 (hereinafter 'Report on ensuring accountability').

for crimes committed whilst serving in a peace operation. Chapter 4 aims to demonstrate the ability, alongside the inability and potential, of states to prosecute their personnel.

The comparative analysis of domestic laws is innovative as no other study has specifically examined whether any states actually have the legal ability to discipline their personnel in a criminal context for misconduct such as sexual exploitation. In demonstrating that states do not necessarily have the laws required to enable prosecution, this thesis shows support for the adoption of a convention (from the Draft Convention, as discussed in Chapter 3) in order to obligate states to enact relevant laws.

The final chapter, Chapter 5, explores the potential of the International Criminal Court (ICC) as a forum for the prosecution of peacekeepers. Substantive law aspects will first be examined- whether or not gender-based crimes committed by peacekeepers would fall within the definitions of the chapeau elements of war crimes and crimes against humanity. Following that, the relevant individual crimes of the Rome Statute of the ICC⁷¹ are assessed, including rape, sexual slavery, enforced prostitution and sexual violence. Given the specific and hierarchal structure of a PSO, command and superior responsibility as a category of individual criminal responsibility is addressed to examine the potential and difficulties of application. Once again immunities are raised, within the context of the Rome Statute: whether immunity would be an impediment to prosecution and how it may be circumvented. The final issues are considered in the context of prosecutorial discretion: the status of peacekeepers as 'big fish' or 'small fish', and how prosecutorial policy may impact on the likelihood of peacekeepers being prosecuted due to such status. Secondly, how the gravity threshold is applied by the Prosecutor and whether crimes committed by peacekeepers would cross that threshold. All of these factors are brought together to form a view on whether the ICC could be used to prosecute peacekeepers.

Perhaps the most original aspect of this thesis is this analysis of the potential of the International Criminal Court as a forum before which to prosecute peacekeeping personnel. A significant amount

⁷¹ Rome Statute of the International Criminal Court, 2187 UNTS 90, entered into force 1 July 2002.

of literature exists on international criminal law and the ICC in particular, as mentioned above. However, there is no other study that has addressed the specific concept of peacekeepers before the ICC. In particular, the concept of command and superior responsibility is an interesting issue to address, as there is existing analysis of the problems of command within peace operations,⁷² but not the problems that this may cause when considering individual criminal responsibility of commanders and superiors.

Analysis of the gender-based crimes of the ICC is also from a different perspective- namely, with the specific victims and perpetrators in mind. There is much literature on the gender-based crimes in international criminal law,⁷³ but none to consider the application of the crimes specific to the ICC in the peacekeeping context, either in relation to the individual crimes or the chapeau elements. Moreover, much of the existing literature concentrates on rape.⁷⁴ While this thesis undertakes a discussion of rape, it also considers the crimes of sexual slavery, enforced prostitution, and sexual violence. An entirely new provision is also suggested; a recommendation for an amendment to the

⁷² E.g. M.M.J. Kelly, *Peace Operations: Tackling the Military Legal and Policy Challenges*, (Australian Government Publishing Service, Canberra 1997); Murphy, 'Legal Framework', *supra* note 12.

⁷³ A selection: T. Meron, 'Rape as a Crime under International Humanitarian Law' (1993) 87 (3) *American Journal of International Law* 424-428; A. Stiglmeier (ed.), *Mass Rape: The War against Women in Bosnia-Herzegovina*, (University of Nebraska Press, Lincoln and London 1994); K.D. Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals*, (Martinus Nijhoff Publishers, The Hague 1997); K.D. Askin, 'The International War Crimes Trial of Anto Furundzija: Major Progress Toward Ending the Cycle of Impunity for Rape Crimes' (1999) 12 *Leiden Journal of International Law* 935-955; C. Steains, 'Gender Issues', in Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, (Kluwer Law International, The Hague 1999), 357-390; K.D. Askin, 'Women's Issues in International Criminal Law: Recent Developments and the Potential Contribution of the ICC', in Shelton (ed.), *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court*, (Transnational Publishers, Inc., Ardsley, New York 2000), 47-63; R. Dixon, 'Rape as a Crime in International Humanitarian Law: Where to from Here?' (2002) 13 (3) *European Journal of International Law* 697-719; D. Buss, 'Prosecuting Mass Rape: Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic' (2002) 10 *Feminist Legal Studies* 91-99; K.D. Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles' (2003) 21 *Berkeley Journal of International Law* 288-316; N.N.R. Quéniwet, *Sexual Offenses in Armed Conflict & International Law*, (Transnational Publishers, Inc., Ardsley, New York 2005); A. Obote-Odora, 'Rape and Sexual Violence in International Law: ICTR Contribution' (2005) 12 *New England Journal of International and Comparative Law* 135-159; MacKinnon, 'Defining Rape', *supra* note 22; S. SaCouto, 'Advances and Missed Opportunities in the International Prosecutions of Gender-Based Crimes' (2006-2007) 10 *Gonzaga Journal of International Law* 49-56; B. Stern and I. Fouchard, 'Sexual Violence as Genocide', in Sadat and Scharf (eds.), *The Theory and Practice of International Criminal Law*, (Martinus Nijhoff Publishers, Leiden 2008), 285-308; MacKinnon, 'The ICTR's Legacy', *supra* note 22; N. Henry, 'Witness to Rape: The Limits and Potential of International War Crimes Trials for Victims of Wartime Sexual Violence' (2010) 2 (1) *International Journal of Transitional Justice* 114-134.

⁷⁴ *Ibid.*

Rome Statute to include a provision proscribing sexual exploitation as a war crime and crime against humanity.

This thesis concludes with the hope of stimulating academic discussion, general scholarship in the area, as well as encouraging practical action by the UN and the ICC. The UN is encouraged to continue to cultivate the Draft Convention, and the ICC to develop a broad definition of gravity and war crimes, as well as for state parties to consider amending the Rome Statute with a new provision to proscribe sexual exploitation.

Overall the thesis seeks to demonstrate the requirement for criminalisation as a form of punishment for peacekeepers who commit gender-based crimes, and to determine the best forum for such prosecution. It pursues an alternative to impunity for such violence against women.

2. Criminalisation of Violence against Women by Peacekeepers

2.1. Introduction

The first step to take when addressing criminalisation of gender-based violence against women by peacekeepers is to ask whether and why such conduct should be criminalised. This includes addressing the concept of criminalisation itself, and questioning the adequacy and efficacy of alternative forms of prohibition and punishment.

As discussed in the introduction, within this thesis, 'gender-based crimes' refers to a variety of conduct that constitutes violence against women and girls based on the fact that they are female. Behaviour categorised as violence against women relevant to this thesis includes rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, trafficking, sexual abuse, activities relating to prostitution, and sexual exploitation.⁷⁵ Currently, not all activities referred to are criminalised- or at least, not criminalised in international law or all national jurisdictions. The behaviours most commonly criminalised are rape, sexual slavery, sexual abuse and trafficking. Prostitution is sometimes criminalised, however most frequently in relation to the actions of the woman in offering sex for money, and less often in relation to the actions of the man in buying sex or procuring women. This chapter will examine the need for criminalisation of prostitution-related activities (particularly the clientele) and sexual exploitation committed by peacekeeping personnel.

The chapter will start with a general discussion of the problem and the international law as it exists. After an introduction to the principles of criminalisation, there will be an in-depth analysis of why prostitution and sexual exploitation by peacekeepers should be criminalised. This will include detailing the effects on women of the behaviour on women; demonstrating how this behaviour

⁷⁵ It is of course the case that men can be victims of rape, sexual slavery, trafficking, sexual exploitation, sexual abuse, and enforced prostitution. However, the majority of victims of these crimes are girls and women.

causes harm to the women involved,⁷⁶ as a violation of their human rights. Finally, the effectiveness of codes of conduct as a non-criminalised method of prevention and punishment will be considered.

Later in this thesis, jurisdictional issues of Australian and United States law will be compared. Hence, the current chapter will make reference to various national laws or regulations, but in particular those of Australia and the United States.

2.2. Definitions and the Problem

2.2.1. Sexual Exploitation

There has been publicity in recent years surrounding instances of sexual exploitation committed by mission personnel.⁷⁷ Accusations and reports have emerged about the commission of sexual exploitation by peacekeepers in missions in the Democratic Republic of the Congo (DRC), Sierra Leone, Liberia, Haiti, East Timor, and Cambodia.⁷⁸

⁷⁶ This argument follows the concept of harm to others as the principle reason for criminalisation. See J. Feinberg, *Harm to Others: The Moral Limits of the Criminal Law*, Vol. 1, (Oxford University Press, New York, Oxford 1984), discussion *infra*.

⁷⁷ E.g. J. Wald, 'U.N. accuses force of sex abuse', *CNN*, (8 January 2005), <http://www.cnn.com/2005/WORLD/africa/01/08/congo.peacekeepers.sex/> 'Burundi: Growing discontent with South African troops', *The Norwegian Council for Africa*, (16 March 2005), <http://www.afrika.no/Detailed/8616.html> M. Dodd, 'Hushed rape of Timor', *The Weekend Australian*, (26 March 2005), <http://www.etan.org/et2005/march/20/26hushed.htm> 'Cote d'Ivoire: French peacekeeping force opens inquiry into sex abuse claims', *IRIN*, (20 May 2005), <http://www.irinnews.org/report.aspx?reportid=54555> 'DRC-Nigeria: 11 policemen suspended over sex abuse allegations in DR Congo', *IRIN*, (27 September 2005), <http://www.irinnews.org/report.aspx?reportid=56514> K. Holt and S. Hughes, 'UN staff accused of raping children in Sudan', *Daily Telegraph*, (2 January 2007), <http://www.telegraph.co.uk/news/worldnews/1538396/UN-staff-accused-of-raping-children-in-Sudan.html> 'UN troops face child abuse claims', *BBC News*, (30 November 2006), <http://news.bbc.co.uk/1/hi/world/americas/6195830.stm> C.J. Williams, 'Sex scandal in Haiti hits U.N. mission', *Baltimore Sun*, (16 December 2007), <http://www.baltimoresun.com/news/world/bal-te.haiti16dec16,0,3111217.story> R. Lindsay, 'U.N. peacekeepers accused of rape', *The Washington Times*, (17 December 2006), <http://www.washingtontimes.com/news/2006/dec/17/20061217-122119-4767r/> L. Charbonneau, 'Peacekeepers may have committed sex abuse in Congo-UN', *Reuters AlertNet*, (12 August 2008), <http://www.alertnet.org/thenews/newsdesk/N12498196.htm> D. Montgomery, 'India peacekeeping forces accused of committing sex crimes in Congo', *Jurist*, (13 August 2008), <http://jurist.law.pitt.edu/paperchase/2008/08/india-peacekeeping-troops-accused-of.php> B.S. Klapper, 'UN: 50 peacekeepers punished for sex abuses', *Associated Press*, (9 November 2009), <http://www.google.com/hostednews/ap/article/ALeqM5jMJ30OyX6btcjGlkS1HAobqkw-JwD9BPE1682>

⁷⁸ P. Higate, 'Gender and Peacekeeping Case Studies: The DRC and Sierra Leone' (Institute for Security Studies, March 2004) ISS Monograph No. 91; Investigation by the Office of Internal Oversight Services into allegations of sexual exploitation and abuse in the United Nations Organization Mission in the Democratic Republic of the Congo, A/59/661, 5 January 2005 (hereinafter OIOS MONUC Investigation); Special measures for protection from sexual exploitation and sexual abuse, Report of the Secretary General, A/59/782 (2005), A/60/861 (2006), A/61/957 (2007), A/62/890 (2008), A/63/720 (2009).

Sexual exploitation is defined by the UN as: “Any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another”.⁷⁹ This is the definition of sexual exploitation that will be used in this thesis,⁸⁰ as the definition is broad.⁸¹ “Sexual purposes” encompasses any form of sexual activity, such as touching, oral sex or intercourse. The definition allows distinct differentiation of sexual exploitation from rape, a crime in which the emphasis is on lack of consent.⁸² While there is an implication of lack of consent in the definition of sexual exploitation, as it is considered “abuse”, the circumstances of sexual exploitation may make it difficult to prove a lack of consent. Hence it is more effective for non-consent to not exist as an element of sexual exploitation.

The definition also emphasises that there is an exchange involved for the sexual activity; that there is a purpose to the commission of the sexual activity. Generally, the situations of sexual exploitation that occur involving peacekeepers entail the peacekeepers offering food or money in exchange for sex- habitually with girls, occasionally boys.⁸³ There are sometimes boys who serve as intermediaries, finding girls (and boys) for the peacekeepers to have sex with- in other words, procuring sexual contact for them.⁸⁴ Exploitation has much in common with prostitution, in that it involves the exchange of goods, money or services for sexual favours. However, as is clear in the definition of sexual exploitation, there is an additional element at play here: abuse of power.

⁷⁹ Secretary-General’s Bulletin, Special measures for protection from sexual exploitation and sexual abuse, ST/SGB/2003/13, 9 October 2003.

⁸⁰ National criminal laws may have differing definitions of sexual exploitation, *e.g.* the Canadian Criminal Code, (R.S., 1985, c. C-46), section 153, which provides for sexual exploitation to apply only to a young person (aged 14-17 years), and refers to such concepts as trust, authority and dependency.

⁸¹ For a view disagreeing with the UN definition of sexual exploitation, *see* O. Simic, 'Rethinking 'sexual exploitation' in UN peacekeeping operations' (2009) 32 *Women's Studies International Forum* 288-295. However, it must be noted that Simic does not discuss the definition as used in this thesis.

⁸² *See* discussion on consent, *supra* Chapter 4.

⁸³ OIOS MONUC Investigation, *supra* note 78; the Secretary-General’s Reports’ statistics confirm that the most common forms of sexual exploitation and abuse committed are sex with minors, sexually exploitative relationships and sex with prostitutes; *see* Special measures for protection from sexual exploitation and sexual abuse, Report of the Secretary General, A/59/782 (2005), A/60/861 (2006), A/61/957 (2007), A/62/890 (2008), A/63/720 (2009); P. Higate, 'Peacekeepers, Masculinities and Sexual Exploitation' (2007) 10 (1) *Men and Masculinities* 99-119, p. 107;

⁸⁴ *Ibid.*

While peacekeepers may not be living with the luxuries that they may have at home, they are generally living in better conditions than some of the local population- or certainly, at least, have more disposable income, and are thus able to afford the sustenance that eludes poorer local girls and women. "The truth... is that it is difficult to find two more unequally situated people involved in the same transaction and occurrence anywhere in our social order."⁸⁵

A principal reason women are driven to a situation of sexual exploitation is their socio-economic vulnerability in post-conflict situations.⁸⁶ For example, one Haitian woman stated that UN CivPol (civilian police) on patrol are only interested in talking to the local women: "These women are not prostitutes who talk to them but they are hungry. They will sell their bodies for money."⁸⁷

2.2.2. Prostitution

Prostitution is the engagement in sexual activity in exchange for payment, usually money. Procurement, or pandering, means obtaining a person as a prostitute for another person (a procurer is commonly known as a pimp). A client solicits a prostitute for sexual activity, or patronises a prostitute.

There is debate in feminist theory over whether prostitution is violence against women or not, and whether prostitution should be legalised/decriminalised.⁸⁸ This thesis does not delve into the broader argument of whether prostitution in general is violence against women, or whether it should be legalised/decriminalised everywhere and at all times, but rather looks at prostitution in the

⁸⁵ D. Leidholdt, 'Prostitution: A Violation of Women's Human Rights' (1993-1994) 1 *Cardozo Women's Law Journal* 133-147, p. 135.

⁸⁶ V. Kent, 'Protecting civilians from UN peacekeepers and humanitarian workers: Sexual exploitation and abuse', in Aoi, et al. (eds.), *Unintended Consequences of Peacekeeping*, (United Nations University Press, Tokyo, New York, Paris 2007), 44-66, p. 52.

⁸⁷ S. Martin, 'Must Boys be Boys? Ending Sexual Exploitation & Abuse in UN Peacekeeping Missions' (Refugees International, October 2005), p. 5.

⁸⁸ See e.g. J. Freeman, 'The Feminist Debate Over Prostitution Reform: Prostitutes' Rights Groups, Radical Feminists, and the (Im)possibility of Consent', 5 *Berkeley Women's L.J.* (1989-1990), pp. 74-109; M.A. Baldwin, 'A Date with Justice: Prostitution and the Decriminalization Debate' (1993-1994) 1 *Cardozo Women's Law Journal* 125-131; C. Meyer, 'Decriminalizing Prostitution: Liberation or Dehumanization?', 1 *Cardozo Women's L.J.* (1993-1994), pp. 105-120; E. Bernstein, 'What's Wrong with Prostitution? What's Right with Sex Work? Comparing Market in Female Sexual Labor' (1999) 10 *Hastings Women's Law Journal* 91-117; J.E. Larson, 'Prostitution, Labor, and Human Rights', 37 *U.C. Davis L. Rev.* (2003-2004), pp. 673-700; I. de Pommereau, 'Rethinking the legal sex trade', *The Christian Science Monitor*, (11 May 2005), <http://www.csmonitor.com/2005/0511/p15s02-woeu.html>; M.M. Dempsey, 'Rethinking Wolfenden: Prostitute-Use, Criminal Law, and Remote Harm' (2005) June *Criminal Law Review* 444-455.

relevant limited settings. These settings are those in which peacekeeping missions are situated, which exist in special conflict or post-conflict circumstances, in turn creating particular societal structures.

2.2.3. The Military, Peacekeepers, and Sex Trade

The increase in peacekeeping personnel, in particular military personnel, acts as a magnet for an increase in the sex industry in mission areas. This increase in demand for commercial sex services also results in an augmentation in trafficking and forced prostitution.⁸⁹ This is evident in the example of Cambodia, where the sex trade increased significantly due to the influx of peacekeeping personnel from 1992.⁹⁰ Between 1992 and 1993, the number of prostitutes in Cambodia rose from 6,000 to 25,000 (including child prostitutes).⁹¹

A dramatic increase is also notable in the former Yugoslavia, particularly in the regions of Kosovo and Bosnia-Herzegovina.⁹² "According to local NGOs, prior to the war in 1999 and the consequent international presence in Kosovo, not only trafficking but also prostitution was very uncommon."⁹³ UNMIK peacekeeping forces arrived in Kosovo in July 1999.⁹⁴ By the end of 1999, brothels had

⁸⁹ For discussion addressing demand as the principle factors in increasing trafficking and prostitution of women, see N. Hotaling and L. Levitas-Martin, 'Increased Demand Resulting in the Flourishing Recruitment and Trafficking of Women and Girls: Related Child Sexual Abuse and Violence Against Women', 13 *Hastings Women's L.J.* (2002), pp. 117-126; K.J. Allred, 'Peacekeepers and Prostitutes: How Deployed Forces Fuel the Demand for Trafficked Women and New Hope for Stopping It' (2006) 33 (1) *Armed Forces & Society* 5-23.

⁹⁰ UN Transitional Authority in Cambodia (UNTAC). Martin, *supra* note 87, p. 4; S. Koyama and H. Myrtilinen, 'Unintended consequences of peace operations on Timor Leste from a gender perspective', in Aoi, et al. (eds.), *Unintended Consequences of Peacekeeping Operations*, (United Nations University Press, Tokyo, New York, Paris 2007), 23-43, p. 32.

⁹¹ Martin, *supra* note 87, p. 4.

⁹² United Nations Mission in Kosovo (UNMIK) and NATO Kosovo Force (KFOR). 'Kosovo (Serbia and Montenegro) "So does it mean that we have the rights?" Protecting the human rights of women and girls trafficked for forced prostitution in Kosovo' (Amnesty International, 6 May 2004) EUR 70/010/2004, pp. 7-8, available at [http://web.amnesty.org/library/pdf/EUR700102004ENGLISH/\\$File/EUR7001004.pdf](http://web.amnesty.org/library/pdf/EUR700102004ENGLISH/$File/EUR7001004.pdf). See also 'Trafficking, Slavery and Peacekeeping: The Need for a Comprehensive Training Program. A Conference Report.' (Transnational Crime and Corruption Centre & UN Interregional Crime and Justice Research Institute, Turin, 9-10 May 2002), pp. 12-13; and J. Gronow, 'Trafficking in Human Beings in Southeastern Europe' (UNICEF, 15 August 2000), p. 47, available at http://www.unicef.org/evaldatabase/files/CEE_CIS_2000_Trafficking.pdf.

⁹³ 'Trafficking in Human Beings in Southeastern Europe: Current Situation and Responses to Trafficking in Human Beings' (UNICEF, UNOHCHR, OSCE ODIHR, 2002), p. 96, available at http://www.osce.org/documents/odihr/2002/06/1847_en.pdf.

⁹⁴ UNMIK, authorised by S/RES/1244 (1999) of 10 June 1999. Missions were present in the former Yugoslavia during the 1990s prior to the conflict, such as the UN Protection Force (UNPROFOR) and the UN Mission in Bosnia and Herzegovina (UNMIBH).

appeared in the immediate vicinity of the mission centres. There was “significant organized prostitution in four locations close to major concentrations of KFOR troops. Most of the clients were reported to be members of the international military presence, while some KFOR soldiers were allegedly also involved in the trafficking process itself.”⁹⁵ Eighteen establishments were identified as places where trafficked women were believed to be working in forced prostitution. Clients of these establishments were identified as Americans, Italians, Germans and French:

“KFOR and UNMIK were publicly identified in early 2000 as a factor in the increase in trafficking for prostitution by the International Organization for Migration (IOM). In May 2000, Pasquale Lupoli, IOM’s Chief of Mission in Kosovo, alleged that KFOR troops and UN staff in Kosovo had fed a “mushrooming of night clubs” in which young girls were being forced into prostitution by criminal gangs. “The large international presence in Kosovo itself makes this trafficking possible.””⁹⁶

It took 1.5 years until the first ‘off-limits’ list was circulated. An ‘off-limits’ list designates specific areas or specific locations that peacekeeping personnel are not permitted to enter. In January 2001 the first ‘off-limits’ list had 75 listed establishments. By July 2003, there were over 200 bars, restaurants, clubs and cafés in Kosovo on the ‘off-limits’ list.⁹⁷ In 2002 it was estimated that 40% of the clientele of prostitutes was international, mostly members of the KFOR contingent.⁹⁸ Elsewhere in the former Yugoslavia, a former UN official found that the closure of prostitution night clubs in Bosnia matched the withdrawal of troops and International Police Task Force (IPTF) from the area.⁹⁹ While a certain percentage of the increased numbers of prostitutes will be local girls and women, a large number may be trafficked women. This was particularly the case in the former Yugoslavia, where Kosovo became a major destination for trafficked women and girls after previously having low levels of both prostitution and trafficking.¹⁰⁰ In these situations, the demand for prostitutes is catered

⁹⁵ ‘So Does It Mean That We Have the Rights?’, *supra* note 92, p. 7; ‘U.N. Peacekeeping: United Nations Faces Challenges in Responding to the Impact of HIV/AIDS on Peacekeeping Operations’ (United States General Accounting Office, Washington, D.C., 12 December 2001) GAO-02-194.

⁹⁶ *Ibid.*, p. 8.

⁹⁷ *Ibid.*

⁹⁸ UNICEF, ‘Trafficking in Human Beings in Southeastern Europe’, 2002, *supra* note 93, p. 96.

⁹⁹ S.E. Mendelson, ‘Barracks and Brothels: Peacekeepers and Human Trafficking in the Balkans’ (Center for Strategic and International Studies (CSIS), Washington, D.C., February 2005), p. 12.

¹⁰⁰ ‘So Does It Mean That We Have the Rights?’, *supra* note 92, p. 7.

to through the growth of organised criminal groups that develop specific rings for trafficking women who end up working as forced prostitutes.¹⁰¹

In East Timor, there was a marked increase in prostitution, mainly in the capital Dili,¹⁰² and also in locations where peacekeepers undertook 'rest and recreation', such as Bali, Indonesia.¹⁰³ There was a subsequent reduction in prostitution corresponding to the withdrawal of troops.¹⁰⁴ Unlike other missions, there was no mission-wide 'off-limits' list for UNMISET.¹⁰⁵ Curfews on personnel were imposed by national contingents, rather than by mission regulations, resulting in contrasting behaviour of different nationals. For example, Australian peacekeepers were restricted by a curfew and the number of alcoholic drinks per day permitted.¹⁰⁶ In contrast, Portuguese troops had no or little restrictions. Consequently they visited massage parlours; were involved in bar brawls; and cases of children fathered by Portuguese soldiers were reported.¹⁰⁷

The United States military is known for its participation in the encouragement and expansion of the commercial sex industry around overseas bases and missions, based on several factors.¹⁰⁸ Firstly, there are numerous studies on the issue.¹⁰⁹ Secondly, the US has the biggest military presence outside its own territory of any state. It has permanent military bases in the Philippines, Korea, Japan and Germany. It was involved in the two World Wars, but has also been heavily involved in armed conflicts outside its territory or region in the 20th and 21st Centuries- the Korean War, the Vietnam

¹⁰¹ Mendelson, *supra* note 99, pp. 14-17.

¹⁰² Koyama and Myrntinen, *supra* note 90, p. 35.

¹⁰³ *Ibid.*, p. 34.

¹⁰⁴ *Ibid.*

¹⁰⁵ UN Mission of Support in East Timor.

¹⁰⁶ Koyama and Myrntinen, *supra* note 90, pp. 35-36.

¹⁰⁷ *Ibid.*

¹⁰⁸ E.N. Chang, 'Engagement Abroad: Enlisted Men, U.S. Military Policy and the Sex Industry' (2001) 15 *Notre Dame Journal of Law, Ethics & Public Policy* 621-653.

¹⁰⁹ L.C.T.B. Turner, 'The Suppression of Prostitution in Relation to Venereal Disease Control in the Army' (1943) 7 *Federal Probation* 8-11; S.P. Sturdevant and B. Stoltzfus, *Let the Good Times Roll: Prostitution and the U.S. Military in Asia*, (The New Press, New York 1992); K.H.S. Moon, *Sex among Allies: Military Prostitution in U.S.-Korea Relations*, (Columbia University Press, New York 1997); R. Schaffer, 'Sex among Allies: Military Prostitution in U.S.-Korea Relations' (1999) 10 (2) *Journal of World History* 499-502; E.N. Chang, 'Engagement Abroad: Enlisted Men, U.S. Military Policy and the Sex Industry' (2001) 15 *Notre Dame Journal of Law, Ethics & Public Policy* 621-653; S. Sun, 'Where the Girls Are: The Management of Venereal Disease by United States Military Forces in Vietnam' (2004) 23 (1) *Literature and Medicine* 66-87; K.J. Allred, 'Human Trafficking: Breaking the Military Link' (2005) IV (4) *The Quarterly Journal* 64-72.

War (where at its height the US had over 550,000 troops in Vietnam, Cambodia and Laos),¹¹⁰ and wars in Iraq and Afghanistan.

Studies on the US military in Asia¹¹¹ have ascertained that the military, far from discouraging the behaviour, saw the development of these industries as part and parcel of international relations, keeping the military involved with local business and politicians- even believing that the increase of the sex industry was a worthy contribution to the development of the local economy.¹¹² It is even part of the US military's recruiting strategy to push the fact that joining the military will mean travelling and exotic experiences- and imply that this includes sexual adventures.¹¹³

In relation to UN peacekeeping involvement, the United States is the largest financial donor,¹¹⁴ but contributes only a relatively small number of personnel, most of whom are civilian police (contracted through companies). For example, in December 2000, the US contributed 885 personnel to peace support operations (PSOs), of whom 849 of which were civilian police.¹¹⁵

2.2.4. Violence against Women

"[V]iolence against women constitutes a violation of the rights and fundamental freedoms of women and impairs or nullifies their enjoyment of those rights and freedoms... "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."¹¹⁶

¹¹⁰ David Bonavia, 'US looks back on worst year in Vietnam', *The Times*, Thursday, Jan 02, 1969; pg. 4; Issue 57448; col A.

¹¹¹ Japan, the Philippines, and Korea are the three main areas in Asia where the U.S. has bases. There was also Vietnam, Laos and Cambodia during the Second Indochinese War (the Vietnam War).

¹¹² See e.g. Moon, *supra* note 109; and Sturdevant and Stoltzfus, *supra* note 109.

¹¹³ A. Bickford, 'See the World, Meet Interesting People, Have Sex With Them: Tourism, Sex, and Recruitment in the U.S. Military', *American Sexuality magazine*, (2003).

¹¹⁴ See the DPSO website 'Financing' at <http://www.un.org/Depts/dpko/dpko/contributors/financing.html>.

¹¹⁵ In March 2007, the US contributed 321 personnel, of whom only 9 were military soldiers and 295 were police. Monthly troop contributor figures available at <http://www.un.org/Depts/dpko/dpko/contributors/>. The last month's numbers, for November 2009, show the US contributing 76 personnel, 57 of whom were civilian police.

¹¹⁶ Preamble and Article 1 of the Declaration on the Elimination of Violence against Women, A/RES/48/104, 23 February 1994.

Such is stated in the Preamble and Article 1 of the Declaration of the Elimination of Violence against Women. Article 2 of the Declaration on the Elimination of Violence against Women defines violence against women as being

“understood to encompass, but not be limited to, the following:

(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;

(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;

(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.”¹¹⁷

There is a broader social context of violence against women.¹¹⁸ In the case of violence against women committed by peacekeepers, the social context can include the domination of developed countries over developing (or North over South), personified by male dominance over local women.¹¹⁹ The local women are treated as inferior to women in home countries, where peacekeeping personnel would not frequent prostitutes, exploit poorer women for sex, or keep a sexual slave.¹²⁰

Within this broad social context, each individual victim of violence against women suffers. In general, women are vulnerable to violence due to economic inequality and discrimination.¹²¹ This situation is exacerbated in the context of post-conflict societies. The report of the Secretary-General on all forms of violence against women of 2006 defines such intersectionality:

¹¹⁷ This is the definition that will be used in this thesis. ‘Violence’ is defined by the Oxford English Dictionary as “The exercise of physical force so as to inflict injury on, or cause damage to, persons or property; action or conduct characterized by this; treatment or usage tending to cause bodily injury or forcibly interfering with personal freedom. “ or “An instance or case of violent, injurious, or severe treatment”. *Oxford English Dictionary*, 2nd Edition, 1989.

¹¹⁸ Report of the Secretary-General, ‘In-depth study on all forms of violence against women’, A/61/122/Add.1, 6 July 2006, para. 73.

¹¹⁹ Although it must be noted that not all peacekeeping personnel come from developed countries. Countries such as Nigeria and Bangladesh contribute some of the largest numbers of personnel to missions.

¹²⁰ P. Higate, ‘Gender and Peacekeeping Case Studies: The DRC and Sierra Leone’ (Institute for Security Studies, March 2004) ISS Monograph No. 91, p. 13, available at [Institute for Security Studies](http://www.iss.co.za/), <http://www.iss.co.za/>.

¹²¹ Secretary-General’s Report on all forms of violence against women, *supra* note 118, para. 86.

“The intersection of male dominance with race, ethnicity, age, caste, religion, culture, language, sexual orientation, migrant and refugee status and disability- frequently termed ‘intersectionality’- operates at many levels in relation to violence against women. Multiple discrimination shapes the forms of violence that a woman experiences. It makes some women more likely to be targeted for certain forms of violence because they have less social status than other women and because perpetrators know such women have fewer options for seeking assistance or reporting.”¹²²

Intersectionality is a concept which is particularly relevant to women in post-conflict situations that are targeted by peacekeeping personnel for the purposes of activities such as prostitution and sexual exploitation.¹²³ Peacekeeping personnel are often a different race and/or ethnicity to the local community they are charged with protecting.¹²⁴ They speak different languages, come from a different culture and possibly have different religions.¹²⁵ One example of the issue of differences in religion occurred in Sierra Leone, where new arrivals to UNAMSIL¹²⁶ who were of the Muslim faith demanded that local women cover their bare breasts.¹²⁷ For the local community, it was acceptable for women to wear nothing on their torso. However, the peacekeeping personnel imposed their own value system upon the women. This was in spite of Rule 2 of the Code of Personal Conduct for Blue Helmets, which obliges peacekeeping personnel to “Respect the law of the land of the host country, their local culture, traditions, customs and practices”.¹²⁸

Of course, the biggest intersection is that of male dominance with economic factors. Peacekeeping personnel have disposable income that local women simply do not. These stark contrasts can create a relationship of instability between peacekeeping personnel and local women if not approached in a

¹²² *Ibid.*, para. 361.

¹²³ For examples of feminist discussions on intersectionality, see C.A. MacKinnon, 'From Practice to Theory, or What is a White Woman Anyway?' (1991) 4 *Yale Journal of Law and Feminism* 13-22; H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis*, (Manchester University Press, Manchester 2000), especially Chapter 7 Human Rights, pp. 201-249.

¹²⁴ J. Petrovic, 'Cultural Context of Peace Operations', in Howard and Oswald (eds.), *The Rule of Law on Peace Operations*, (Asia-Pacific Centre for Military Law, Melbourne 2002), 213-221.

¹²⁵ *Ibid.*

¹²⁶ United Nations Mission in Sierra Leone.

¹²⁷ Higate, 'Case Studies: DRC & Sierra Leone', *supra* note 120, pp. 46-47; P. Higate, 'Peacekeepers and Gender: DRC and Sierra Leone', *Pambazuka News*, (8 July 2004), <http://www.pambazuka.org/#2>, pp. 2-3.

¹²⁸ Department of Peacekeeping Operations, Ten Rules Code of Personal Conduct for Blue Helmets, available at <http://edu.unlb.org/UNStandardsOfConduct/TenRulesCodeofPersonalConductForBlueHelmets.aspx>. For further discussion on the Code of Conduct, see *infra* United Nations Codes of Conduct.

sensitive and appropriate manner. For example, in the DRC, the relative wealth of the peacekeepers is seen as an issue by local people, particularly with regard to the attitudes of peacekeepers towards local women, and the peacekeepers being seen as 'powerful' in these regards.¹²⁹

The women targeted for sexual exploitation are also frequently refugees or internally displaced persons, which means they are subject to a lack of resources and stability in their everyday life, and thus, more vulnerable to violence.¹³⁰ Women working in brothels are often trafficked, and thus kept in a lifestyle of slavery involving coercion and violence.¹³¹ On top of these factors is the basic fact that a lot of peacekeeping personnel carry weapons, which puts them in a position of power over any unarmed person.

Prostitution and sexual exploitation reinforce women's sexuality as a commodity, rather than recognising a woman's sexual autonomy. Sexual autonomy is a person's right to freely choose when and with whom they engage in sexual activities. In treating women like sexual objects, in their acts of violence against women, there are many possible reasons for the actions of the male peacekeeping personnel. It may be a use of violence against women "as a way of disciplining women for transgressions of traditional female roles or when they perceive challenges to their masculinity".¹³² This is particularly the case in situations where there are cultural and religious differences, where attitudes of discrimination and intolerance may prevail against women behaving in a different manner to that of women in their home society. Alternatively, it may be that these women are in fact not transgressing traditional female roles, but are in fact fitting right into the 'other' female role that these men do not access in their 'normal' daily life back in their home country. The 'other' female

¹²⁹ Higate, 'Case Studies: DRC & Sierra Leone', *supra* note 120, p. 17.

¹³⁰ UNHCR and Save the Children UK, 'Sexual Violence and Exploitation: The Experience of Refugee Children in Liberia, Guinea and Sierra Leone', (2002), <http://www.womenwarpeace.org/docs/savereport.doc>; Report of the Office of Internal Oversight Services on the investigation into sexual exploitation of refugees by aid workers in West Africa, 11 October 2002, A/57/465; J. Gardam and M. Jarvis, *Women, Armed Conflict and International Law*, (Kluwer Law International, The Hague 2001), pp. 30-33.

¹³¹ See, e.g. Mendelson, *supra* note 99, pp. 9-10.

¹³² Report of the Secretary-General (2006), *supra* note 118, para. 75.

role is that of 'whore', in opposition to 'Madonna'- the bipolar images of a woman as either 'dirty' (i.e. a sexual object) or 'good' (i.e. marriageable).¹³³

2.2.5. Effects on the Mission of Sexual Exploitation and Abuse by Peacekeepers

A principle of peacekeeping is to 'do no harm': "It is the duty of each peacekeeper to protect the vulnerable and to refrain from doing harm".¹³⁴ Peacekeepers have a duty of care to the people they are sent to protect.¹³⁵ In a letter to the General-Assembly in 2005, then Secretary-General Kofi Annan, referring to sexual exploitation and abuse by peacekeepers, found that "such abhorrent acts are a violation of the fundamental duty of care that all United Nations peacekeeping personnel owe to the local population".¹³⁶ Sexually exploitative behaviour conducted by peacekeepers also creates problems with the potential success of a mission. Cooperation with and support of the local population are vital elements of a peace support mission, and "the sexual exploitation scandals... have created additional distrust among the local population towards male peacekeepers".¹³⁷ Acceptable conduct must be exercised by mission personnel at all times to ensure the best possible relations with local communities, which in turn contributes towards the effectiveness of the mission.¹³⁸

Misconduct by members of a mission may also affect morale and effectiveness of the mission units. A vital aspect of a military force is its cohesiveness, obtained through values such as trust and heightened through camaraderie and high morale.¹³⁹ Negative behaviour by troops, as well as

¹³³ B. Cooper, 'Prostitution: A Feminist Analysis' (1989) 11 *Women's Rights Law Reporter* 99-119, p. 102. *See infra*.

¹³⁴ The Peacekeepers' Duty of Care; *see* http://www.un.org/en/peacekeeping/publications/yir/2005/duty_of_care.htm; MINURSO's *Conduct & Discipline/Welfare* newsletter, Vol. I, Issue I, March 2007 at <http://www.minurso.unlb.org/conduct/march07.pdf>.

¹³⁵ *Ibid*.

¹³⁶ Letter dated 24 March 2005 from the Secretary-General to the President of the General Assembly, 24 March 2005, A/59/710.

¹³⁷ Martin, *supra* note 87, p. 7 (specific reference to distrust in the Democratic Republic of the Congo).

¹³⁸ H. McCoubrey and N.D. White, *The Blue Helmets: Legal Regulation of United Nations Military Operations*, (Dartmouth Publishing Company Limited, Aldershot 1996), p. 177; *see also* The Peacekeeper's Duty of Care, *supra* note 134.

¹³⁹ "Military organizational effectiveness should encompass social structure... non-material factors (esprit, staying power, and will to fight), and... morale and political attitudes..."; J.K. Sagala, 'HIV/AIDS and the

negative assertions and attitudes towards the mission from both within and without the operation reduce the ability of troops to function effectively together.¹⁴⁰

This first section has outlined the problem of violence against women by peacekeepers, particularly sexual exploitation and prostitution-related activities. It is the argument of this thesis that such conduct should be criminalised. The next section of this chapter will outline the principles of criminalisation before applying the principles to violence against women by peacekeepers.

2.3. Principles of Criminalisation

Violence against women by peacekeepers should be criminalised, but there must be valid reasons as to why. This section will summarise the general principles of criminalisation in order to demonstrate what criteria need to be fulfilled for conduct to be criminalised.

The function of criminal law

“is to preserve public order and decency, to protect citizens from what is offensive or injurious and to provide sufficient safeguards against exploitation and aggravation of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence. It is not... the function of the law to intervene in the private lives of citizens.”¹⁴¹

The central aim of criminal law, then, is, or ought to be to prevent harm.¹⁴² The law imposes rules of behaviour that ensure all people enjoy life in society.¹⁴³ It prevents harm by imposing punishment, such as imprisonment, “in situations where tortious remedies are an insufficient deterrent” for anti-social behaviour.¹⁴⁴ Punishment acts not only as a deterrent for anti-social behaviour, but as an imposition of hardship upon a defendant for a wrongdoing, as a method of retribution deserved by the wrongdoer, with the severity of the sentence imposed equating to the severity of the

Military in Sub-Saharan Africa: Impact on Military Organizational Effectiveness' (2006) 53 (1) *Africa Today* 53-77, p. 59.

¹⁴⁰ *Ibid.*, pp. 58-59.

¹⁴¹ Wolfenden Committee, cited in W. Wilson, *Central Issues in Criminal Theory*, (Hart Publishing, Oxford-Portland Oregon 2002), p. 32.

¹⁴² A.P. Simester and G.R. Sullivan, *Criminal Law : Theory and Doctrine*, 3rd ed., (Hart, Oxford 2007), p. 2; Wilson, *supra* note 141, p. 19; Feinberg, *Harm to Others*, *supra* note 76.

¹⁴³ H. Gross, *A Theory of Criminal Justice*, (Oxford University Press, New York 1979), p. 10; M. Findlay, *Criminal Law: Problems in Context*, 2nd ed., (Oxford University Press, South Melbourne 2006), p. 3.

¹⁴⁴ Simester and Sullivan, *supra* note 142, p. 4.

wrongdoing committed.¹⁴⁵ Criminalisation of certain behaviour communicates to society that “the prohibited activity is a serious wrong that *must* not be done”.¹⁴⁶

Criminal law is a public rather than private law, because it is in the interest of the public to control, prevent and prosecute criminal offences.¹⁴⁷ Behaviour is criminalised “because it consists in wrongdoing which directly and in serious degree threatens the security or well-being of society, and because it is not safe to leave it redressable only by compensation of the party injured”.¹⁴⁸ A criminal conviction “is a pronouncement made on behalf of society and is a form of community condemnation”.¹⁴⁹ Some behaviour is criminalised because it is inherently wrong (*mala in se*), and other behaviour is wrong because it is illegal (*mala prohibita*).¹⁵⁰

Simester and Sullivan state that the “imposition of a criminal sanction represents the most severe infringement of a person’s liberty, and, as such, should be available only where there is a clear social justification”.¹⁵¹ The question is then, what factors are used for measuring if there is social justification for criminalisation?

2.3.1. Justification for Criminalisation¹⁵²

2.3.1.1. Harm to Others

Lord Mostyn stated:

“[N]ew offences should be created only when absolutely necessary. In considering whether new offences should be created, factors taken into account include whether:

¹⁴⁵ *Ibid.*, pp. 4, 33. J. Dressler, *Understanding Criminal Law*, 3rd ed., (Lexis Publishing, New York 2001), pp. 14-22; J.B. White, 'Making Sense of the Criminal Law' (1978) 50 *University of Colorado Law Review* 1-27, pp. 3-4.

¹⁴⁶ Simester and Sullivan, *supra* note 142, p. 22. Criminalisation of behaviour is social criticism of the conduct in question; Gross, *supra* note 143, pp. 6-7.

¹⁴⁷ It is, however, more complicated than this in certain jurisdictions, including international criminal law, where the rise of victims’ rights has in some ways moved criminal law to a more private law mentality. See e.g. M.C. Bassiouni, 'International Recognition of Victims' Rights' (2006) 6 (2) *Human Rights Law Review* 203-279.

¹⁴⁸ Allen, *Legal Duties and Other Essays in Jurisprudence* (1931), pp. 233-4, cited in Simester and Sullivan, *supra* note 142, p. 2.

¹⁴⁹ Simester and Sullivan, *supra* note 142, p. 5.

¹⁵⁰ *Ibid.*, p. 3; Gross, *supra* note 143, pp. 122-124.

¹⁵¹ Simester and Sullivan, *supra* note 142, p. 8.

¹⁵² The Anglo-American principles of criminalisation will be applied; for European continental counterparts to the harm principle, see N. Persak, *Criminalising Harmful Conduct: The Harm Principle, its Limits and Continental Counterparts*, (Springer, New York 2007), Chapter V, pp. 95 ff.

the behaviour in question is sufficiently serious to warrant intervention by the criminal law;

the mischief could be dealt with under existing legislation or using other remedies;

the proposed offence is enforceable in practice;

the proposed offence is tightly drawn and legally sound; and

the proposed penalty is commensurate with the seriousness of the offence.”¹⁵³

The first element of this list examines the seriousness of the behaviour in question. This requires examining the harm committed. There are two areas of harm identified by Feinberg: harm to others, and harm to self (paternalistic justification).¹⁵⁴ Other suggested bases for criminalisation, counterposed to harm, are offence to others and immorality.¹⁵⁵ Generally, criminalisation based solely on reasoning related to morality and paternalism is rejected by liberal theorists, although soft paternalism is consistent with liberal argumentation. This thesis argues paternalistic reasons for the criminalisation of prostitution-related behaviour and sexual exploitation, but only in conjunction with the main argument that this behaviour results in harm to others.

The harm principle has been advocated as the principal reason for criminalisation by many criminal theorists such as Joel Feinberg¹⁵⁶ and John Stuart Mill.¹⁵⁷ Feinberg explains the principle:

“It is always a good reason in support of penal legislation that it would probably be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and there is probably not other means that is equally effective at no great cost to other values.”¹⁵⁸

In following the harm principle, the specific effects of the conduct in question must be identified- how does the conduct harm others? Harm is generally defined as a setback to interests,¹⁵⁹ “the

¹⁵³ Lord Williams of Mostyn, H.L. Deb., vol. 602, col. WA58; June 18, 1999, ‘New Criminal Offences’ (emphasis added). Penalties will not be discussed in this thesis.

¹⁵⁴ Feinberg, *Harm to Others*, *supra* note 76; and J. Feinberg, *Harm to Self: The Moral Limits of the Criminal Law*, Vol. 3, (Oxford University Press, New York, Oxford 1986).

¹⁵⁵ J. Feinberg, *Offense to Others: The Moral Limits of the Criminal Law*, Vol. 2, (Oxford University Press, New York, Oxford 1985); J. Feinberg, *Harmless Wrongdoing: The Moral Limits of the Criminal Law*, Vol. 4, (Oxford University Press, New York, Oxford 1988); and A.P. Simester and A. von Hirsch, ‘Rethinking the Offense Principle’ (2002) 8 (3) *Legal Theory* 269-295.

¹⁵⁶ *Ibid.*

¹⁵⁷ J.S. Mill, *On Liberty*, (ElecBook, London 2001 (orig. 1859)), p.18.

¹⁵⁸ Feinberg, *Harm to Others*, *supra* note 76, p. 26.

¹⁵⁹ *Ibid.*, Chapter 1, ‘Harms as Setbacks to Interest’, pp. 31-64. Gross, *supra* note 143, p. 115.

impairment of a person's opportunities to engage in worthwhile activities and relationships, and to pursue valuable, self-chosen, goals",¹⁶⁰ and a 'wrong' as "a violation of somebody's rights".¹⁶¹ That is, harm results in the reduction of quality of life for the victim. The interests affected may include proprietary interests, as well as a person's physical integrity and well-being.¹⁶²

For behaviour to be criminalised, the seriousness of the harm must be considered. Harm committed must also be a wrongful act or omission. Conduct that results in harm and merits criminalisation is generally seen as *prima facie* wrong.¹⁶³ A legislative authority should consider the gravity or seriousness of the harm, as well as the likelihood or probability of the harm. The case for criminalisation strengthens the greater the gravity or seriousness, and likelihood or probability of the harm.¹⁶⁴

If remote harms can be imputed back to the defendant, it is appropriate to criminalise remote harms. Remote harms include those resulting from "conduct the riskiness of which depends on the existence of a contingency",¹⁶⁵ such as a prohibition of high blood-alcohol level when driving; "conduct which has no ill consequences in itself, but which is thought to induce or lead to further acts... that create or risk harm",¹⁶⁶ such as gun possession; and conduct which only results in harm when "combined with similar acts of others",¹⁶⁷ such as pollution caused by dumping garbage into water systems. The defendant may be in a situation where they sought to assist or encourage the conduct of others which directly caused the harm. In such situations, it must be clear that the conduct in question is linked to the subsequent harm.¹⁶⁸

¹⁶⁰ Simester and Sullivan, *supra* note 142, p. 10.

¹⁶¹ Feinberg, *Harm to Others*, *supra* note 76, p. 34.

¹⁶² *Ibid.*, p. 10-11; Wilson, *supra* note 141, p. 24; Gross, *supra* note 143 pp. 116-122.

¹⁶³ Simester and Sullivan, *ibid.*, p. 12, *see fn. 33*. *See also* D.N. Husak, 'Limitations on Criminalization and the General Part of Criminal Law', in Shute and Simester (eds.), *Criminal Law Theory: Doctrines of the General Part*, (Oxford University Press, Oxford 2002), p. 27 "only conduct worthy of condemnation may be punished".

¹⁶⁴ Wilson, *supra* note 141, p. 22.

¹⁶⁵ A. von Hirsch, 'Extending the Harm Principle: 'Remote' Harms and Fair Imputation', in Simester and Smith (eds.), *Harm and Culpability*, (Clarendon Press, Oxford 1996), 259-276, p. 263.

¹⁶⁶ *Ibid.*, p. 264.

¹⁶⁷ *Ibid.*, p. 265.

¹⁶⁸ Wilson, *supra* note 141, p. 28-29.

2.3.1.2. **Paternalism**

The theory of paternalism aims to prevent harm to oneself.

“It is always a good reason in support of a prohibition that it is probably necessary to prevent harm (physical, psychological, or economic) to the actor himself.”¹⁶⁹

This involves preventing the offender from committing certain acts for their own sake; acts which will result in harm to the offender. Feinberg refers to paternalism as a category of harm, ‘harm to self’, but others categorise paternalism as a stand-alone principle separate from harm.¹⁷⁰ Paternalistic laws cover the prohibition of such behaviour as suicide, euthanasia, and possession and use of drugs, and the positive obligation to wear a seatbelt.¹⁷¹

There is generally considered to be two categories of paternalism- hard and soft paternalism. Hard paternalism justifies criminalisation on the basis that “it is necessary to protect competent adults, against their will, from the harmful consequences even of their fully voluntary choices and undertakings”.¹⁷² Soft paternalism reasons that criminalisation is justified “to prevent self-regarding harmful conduct... *when but only when* that conduct is substantially nonvoluntary, or when temporary intervention is necessary to establish whether it is voluntary or not”.¹⁷³

Some theorists such as Mill argue that paternalism is not an appropriate reason for criminalisation.

“The only purpose for which power can be rightfully exercised over any member of a civilised community against his will is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear... because in the opinion of others to do so would be wise or even right.”¹⁷⁴

While Feinberg argues that “hard paternalistic justification of any restriction of personal liberty is especially offensive morally, because it invades the realm of personal autonomy”,¹⁷⁵ a certain degree of paternalistic notions is acceptable as reasoning in criminalisation. An argument for criminalisation

¹⁶⁹ Feinberg, *Harm to Others*, *supra* note 76, pp. 26-7.

¹⁷⁰ Feinberg, *Harm to Self*, *supra* note 154; Persak, *supra* note 152, p. 17.

¹⁷¹ Persak, *supra* note 152., p. 13.

¹⁷² Feinberg, *Harm to Self*, *supra* note 154, p. 12.

¹⁷³ *Ibid.*

¹⁷⁴ Mill, *supra* note 157.

¹⁷⁵ Feinberg, *Harm to Self*, p. 25. Feinberg does not support paternalism, and presents the theory that soft paternalism is in fact ‘anti-paternalism’. Feinberg, *Harm to Self*, *supra* note 154, p. 15.

based on paternalistic reasons must “show why it is justified to coerce D and promote her welfare at the expense of her autonomy”.¹⁷⁶ Thus, paternalistic arguments should not be applied liberally and wantonly, but cautiously and infrequently.¹⁷⁷

2.3.1.3. Offence to Others

Another identified basis for criminalisation is that of the offence principle, and is defined by Feinberg as follows:

“It is always a good reason in support of a proposed criminal prohibition that it is probably necessary to prevent serious offense to persons other than the actor and would probably be an effective means to that end if enacted.”¹⁷⁸

The offence principle cannot be satisfied by mere evil or unpleasant conduct. The conduct in question must cause serious offence to a large enough portion of society. Hence the pervasiveness and the intensity of the offence should be measured. If behaviour is easily avoidable by those who would be affronted by it, there is less argument for criminalisation. Following the principle of freedom of expression, “the broader social impact of the conduct is also considered”.¹⁷⁹ Thus, if conduct has a general social usefulness, there is less support for criminalisation. Simester and Sullivan argue beyond Feinberg’s definition, that the offensive behaviour must also be wrongful.¹⁸⁰ “What makes offensive conduct wrong... is that it treats other persons with a gross lack of consideration or respect”.¹⁸¹ Thus, offensive conduct conveys a lack of consideration or respect for and to the victim.

2.3.2. Other Factors in Criminalisation: Individual Liberties, Alternative Measures and Practical Issues

Aside from these factors, it must always be considered whether criminalisation of the behaviour in question intrudes too much upon individual liberties and autonomy. “[I]f the law is to respect the right of citizens to control their own lives, it should not deprive them of that control without good

¹⁷⁶ Simester and Sullivan, *supra* note 142, p. 19.

¹⁷⁷ Husak, *supra* note 163, p. 34.

¹⁷⁸ Feinberg, *Harm to Others*, *supra* note 76, p. 26.

¹⁷⁹ Simester and Sullivan, *supra* note 142, p. 15.

¹⁸⁰ *Ibid.*, pp. 15-16.

¹⁸¹ *Ibid.*, p. 16.

reason.”¹⁸² Criminal prohibitions are necessary to protect society from harm, but must not reach so far as to restrict the individual’s right to liberty. Individual welfare and liberty must be balanced against the seriousness of the harm itself and the probability of the harm, as well as the collective welfare of society, and the final decision must support individual autonomy.¹⁸³

Before any conduct is criminalised, alternative measures to criminal sanctions should be examined. Only if another form of regulation not amounting to criminalisation has proven to be or would be ineffective in preventing or regulating the conduct in question should criminalisation be an option. The law must exist only “to achieve a compelling government purpose... and the law must be necessary to accomplish that purpose. A law is not necessary unless it is the least restrictive means to attain its objective.”¹⁸⁴ Thus, offences should be created only where absolutely necessary- criminalisation should be the *ultima ratio*, the last resort for preventing anti-social behaviour.

Practical issues should also be addressed. Is the offence structured narrowly enough to clearly state what conduct is prohibited? Is the offence capable of being policed, enforced and prosecuted by the various actors in the law enforcement and legal systems? Factors such as to what extent a crime is able to be detected, the cost of enforcement, and the comparative balance of effectiveness of policing the offence and the prevention of the offence should all be considered.

This section has discussed the general principles of criminalisation. In the following section of this chapter, these principles will be applied to the topic in question, whether prostitution-related activities and sexual exploitation by peacekeepers should be criminalised.

2.4. Reasons for Criminalisation of Prostitution-related Activities and Sexual Exploitation by Peacekeepers

The previous section has demonstrated the principles of criminalisation. How then are these applied to prostitution-related activities and sexual exploitation by peacekeepers? Why should such conduct be criminalised? This section of the chapter will firstly look at the obligations of states under

¹⁸² *Ibid.*, p. 7. See also Wilson, *supra* note 141, pp. 18-19; and Feinberg, *Harm to Others*, *supra* note 76, p. 9.

¹⁸³ Wilson, *supra* note 141, pp. 38- 42.

¹⁸⁴ Husak, *supra* note 163, pp. 22, 36.

international law to criminalise violence against women. However whether states are required to uphold human rights obligations outside the territory of the state then becomes an issue. Hence secondly the section will examine the extraterritorial application of human rights; analysing case law of international and regional bodies. The third and fourth sub-sections will consider the principles of harm to others and paternalism resulting from sexual exploitation and prostitution-related activities by peacekeepers. Finally, codes of conduct as alternative forms of regulation will be appraised.

2.4.1. States' Obligations to Criminalise Violence against Women

"Impunity for violence against women compounds the effects of such violence as a mechanism of control. When the State fails to hold the perpetrators accountable, impunity not only intensifies the subordination and powerlessness of the targets of violence, but also sends a message to society that male violence against women is both acceptable and inevitable. As a result, patterns of violent behaviour are normalised... State inaction with regard to the proper functioning of the criminal justice system has particularly corrosive effects as impunity for acts of violence against women encourages further violence and reinforces women's subordination."¹⁸⁵

States have a responsibility under international law to criminalise violence against women. Failure to do so is a violation of obligations to prevent, punish, and investigate acts of violence, and to provide remedy for violence perpetrated against women. This failure may result in state accountability to one of the human rights bodies.

At the level of customary law, states have an obligation to exercise due diligence to prevent harm committed by both state and private actors.¹⁸⁶ This principle was stated in the case of *Alabama Claims (U.S. v Gr. Brit.)* in 1872,¹⁸⁷ and is now supported by a wealth of international instruments that impose the duty on states to prevent harm through legislative and other means, as well as case law that supports the capacity of human rights bodies to enforce accountability for this duty.¹⁸⁸

¹⁸⁵ Report of the Secretary-General on violence against women, *supra* note 118, paras. 76 & 96.

¹⁸⁶ R.J. Cook, 'Accountability in International Law for Violations of Women's Rights by Non-State Actors', 25 *Stud. Transnat'l Legal Pol'y* (1993), pp. 97-98.

¹⁸⁷ *Alabama Claims (U.S. v Gr. Brit.)*, 3 Geneva Arb. 8 (1872).

¹⁸⁸ See following discussion.

There are several international and regional instruments which obligate states to criminalise violence against women, whether directly or more generally:¹⁸⁹ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);¹⁹⁰ the International Covenant on Civil and Political Rights (ICCPR);¹⁹¹ the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the Palermo Protocol);¹⁹² American Convention on Human Rights (the American Convention);¹⁹³ the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará);¹⁹⁴ the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Protocol);¹⁹⁵ and the European Convention on Human Rights (ECHR).¹⁹⁶

CEDAW is the most prominent and wide-ranging source of the obligation to criminalise trafficking, and exploitation of prostitution of women, as it is an international rather than regional instrument.¹⁹⁷

The Convention has 185 state parties, including Australia.¹⁹⁸ Notably and surprisingly, given the strong feminist movement in the United States, the US is not a state party. Article 6 obliges all "States Parties [to] take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women".

¹⁸⁹ The Convention on the Rights of the Child (CROC) and its Optional Protocol contain many provisions relating to criminalisation of activities such as sexual exploitation, sale of children, prostitution and pornography in relation to children, which covers the girl child. However, this Convention will not be discussed in this thesis. CROC, 1577 UNTS 3, entered into force 2 September 1990.

¹⁹⁰ Convention on the Elimination of All Forms of Discrimination against Women, GA Res. 34/180, A/34/46, entered into force 3 September 1981.

¹⁹¹ International Covenant on Civil and Political Rights, 999 UNTS 171, entered into force 23 March 1976.

¹⁹² Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, GA RES. 25, annex II, A/45/49 (Vol. I) (2001), entered into force 25 December 2003.

¹⁹³ American Convention on Human Rights, OAS Treaty Series No. 36, 1144 UNTS 123, entered into force 18 July 1978.

¹⁹⁴ Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, 33 ILM 1534 (1994), entered into force 5 March 1995.

¹⁹⁵ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, CAB/LEG/66.6, 13 September 2000.

¹⁹⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms, (ETS 5), 213 UNTS 222, entered into force 3 September 1953.

¹⁹⁷ See Cook, 'Accountability in International Law', *supra* note 186, pp. 94-116.

¹⁹⁸ Australia became a state party in 1982. See <http://www.un.org/womenwatch/daw/cedaw/states.htm>.

The ICCPR prohibits torture and inhuman and degrading treatment, slavery, servitude and compulsory or forced labour.¹⁹⁹ Australia and the US are parties to the ICCPR. Under Article 2(2) of the ICCPR, state parties must “where not already provided for by existing legislative or other measures... adopt such laws or other measures as may be necessary to give effect to the rights recognised in the present Covenant”. Furthermore, each state party to the Covenant must “ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity,” and “ensure that the competent authorities shall enforce such remedies when granted”.²⁰⁰ There is also a mechanism to ensure state accountability for violations of this obligation. State parties are required to report to the Human Rights Committee (HRC) on “measures taken to eliminate trafficking of women and children, within the country or across borders, and forced prostitution. They must also provide information on measures taken to protect women and children, including foreign women and children, from slavery...”²⁰¹ There is also a requirement to provide the HRC with

“the provisions of their criminal law which penalize torture and cruel, inhuman and degrading treatment or punishment, specifying the penalties applicable to such acts, whether committed by public officials or other persons acting on behalf of the State, or by private persons. Those who violate article 7, whether by encouraging, ordering, tolerating or perpetrating prohibited acts, must be held responsible.”²⁰²

Thus there is an international obligation on state parties to criminalise and punish torture and inhuman and degrading treatment, slavery, servitude and forced labour, the definitions of which can be structured to include trafficking, sexual slavery, sexual exploitation and forced prostitution.

Article 5 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (known as the Palermo Protocol) imposes a specific obligation to criminalise trafficking in persons:

¹⁹⁹ ICCPR, Articles 7 & 8.

²⁰⁰ ICCPR, Article 2(3)(a) and (c).

²⁰¹ ICCPR General Comment 28 (68th session, 2000): Article 3: Equality of Rights Between Men and Women, A/55/40 vol. I (2000) 133 at para. 12.

²⁰² ICCPR General Comment 20 (Forty-fourth session, 1992): Article 7: Concerning Prohibition of Torture and Cruel Treatment or Punishment, A/47/40 (1992) 193, para. 13.

Criminalization

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.

Article 5(2) also requires the criminalisation of attempt, acting as an accomplice, and organising or directing other persons to commit an offence.

While this is a relatively new Protocol, and has only been in force since late 2003, Australia and the US ratified the Protocol in late 2005.²⁰³ This has given both countries time to enact criminal legislation prohibiting trafficking-related offences, as per their obligation under the Palermo Protocol.²⁰⁴ In particular, Article 5(2)(b), requiring criminalisation of accomplice participation, is particularly relevant. The requirement can be interpreted widely by states to encompass behaviour that includes patronising brothels where trafficked women work as prostitutes.²⁰⁵

The Committee on the Rights of the Child, in General Comment 4 confirmed the “obligation of States parties to enact and enforce laws to prohibit all forms of sexual exploitation and related trafficking”.²⁰⁶ While the General Comment dealt specifically with adolescents, the statement of the Committee is notable in that it obliges state parties to criminalise *all forms* of sexual exploitation and related trafficking, and not just exploitation relating to adolescents or children. However, the mandate of the Committee on the Rights of the Child is restricted to only issues falling under the Convention on the Rights of the Child, and thus imposing obligations relating to adults is outside the ambit of the Committee. The Convention on the Rights of the Child has 193 state parties, more than any other international human rights convention.²⁰⁷

²⁰³ Entry into force 25 December 2003. The Protocol has 135 state parties as of 4 January 2010.

²⁰⁴ See *infra* for discussion of national criminal laws.

²⁰⁵ See discussion *supra* about the link between patronising brothels and trafficking.

²⁰⁶ CRC General Comment 4 (33rd session, 2003): Adolescent Health and Development in the Context of the Convention on the Rights of the Child, A/59/41 (2004) 102 at para. 37; CROC Article 34.

²⁰⁷ As of 4 January 2010. Somalia and the United States are the only states to have signed but not ratified the CROC.

At regional level, the American Convention on Human Rights imposes upon state parties an obligation to respect the rights within the convention.²⁰⁸ Such rights include freedom from slavery and forced labour, prohibition of trafficking in women, freedom from torture, cruel, inhuman or degrading treatment, and the rights to life and liberty.²⁰⁹ It also requires state parties,

“[w]here the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions... to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.”²¹⁰

In the *Velasquez Rodriguez* case,²¹¹ the Inter-American Court of Human Rights found that the Court could compel a state to ensure the fulfilment of rights under the American Convention, and discussed in detail the obligations of state parties in relation to ensuring full enjoyment of Convention Rights. The Court held that state parties had a

“fundamental duty to respect and guarantee the rights recognized in the Convention. Any impairment of those rights which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by the Convention.”²¹²

This ruling indicates that a state party to the American Convention could be held accountable before the Inter-American Court of Human Rights for not enacting and enforcing legislation criminalising trafficking in women, sexual exploitation, and prostitution-related activities by peacekeeping personnel. This accountability could be two-fold: firstly, under the state’s obligation to respect and guarantee Convention rights.

“As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.... An illegal act which violates human rights and which is initially not directly imputable

²⁰⁸ American Convention, Article 1 Obligation to Respect Rights. The United States is not a party to the American Convention on Human Rights.

²⁰⁹ American Convention, Article 4 Right to Life; Article 5 Right to Humane Treatment; Article 6 Freedom from Slavery (specifically covers trafficking in women); Article 7 Right to Personal Liberty.

²¹⁰ American Convention, Article 2 Domestic Legal Effects.

²¹¹ *Velasquez Rodriguez* Case, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).

²¹² *Velasquez Rodriguez* Case, para. 164.

to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention... This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages.”²¹³

As well as prevention, state parties are obligated to investigate all violations of convention rights. The failure of state party to punish the violation and restore the victim’s enjoyment of rights amounts to a failure “to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction”.²¹⁴

The Inter-American Court specified that the duty to investigate “is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective.”²¹⁵ The investigation must be undertaken by the state rather than the victim or the victim’s family. The Inter-American Court held that “[w]here the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.”²¹⁶

The second category of accountability arises from the fact that peacekeeping personnel could be considered actors of ‘public authority’ or “persons who use their position of authority”²¹⁷ and thus their actions would be imputable to the state.²¹⁸

The Convention of Belém do Pará²¹⁹ deals in detail with the duties of states in relation to state law preventing and punishing violence against women, and covers criminalisation of any crimes of violence against women by peacekeeping personnel:

²¹³ *Velasquez Rodriguez Case*, paras. 166, 172 & 175.

²¹⁴ *Velasquez Rodriguez Case*, para. 176.

²¹⁵ *Velasquez Rodriguez Case*, para. 177.

²¹⁶ *Ibid.*

²¹⁷ *Velasquez Rodriguez Case*, para. 172.

²¹⁸ See *infra* Extraterritorial Application of Human Rights for further discussion.

The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to:

1. refrain from engaging in any act or practice of violence against women and to ensure that their authorities, officials, personnel, agents, and institutions act in conformity with this obligation;
2. apply due diligence to prevent, investigate and impose penalties for violence against women;
3. include in their domestic legislation penal, civil, administrative and any other type of provisions that may be needed to prevent, punish and eradicate violence against women and to adopt appropriate administrative measures where necessary;
4. adopt legal measures to require the perpetrator to refrain from harassing, intimidating or threatening the woman or using any method that harms or endangers her life or integrity, or damages her property;
5. take all appropriate measures, including legislative measures, to amend or repeal existing laws and regulations or to modify legal or customary practices which sustain the persistence and tolerance of violence against women;
6. establish fair and effective legal procedures for women who have been subjected to violence which include, among others, protective measures, a timely hearing and effective access to such procedures;
7. establish the necessary legal and administrative mechanisms to ensure that women subjected to violence have effective access to restitution, reparations or other just and effective remedies; and
8. adopt such legislative or other measures as may be necessary to give effect to this Convention.²²⁰

Fulfilment of obligations under this convention would mean state parties such as Haiti enacting legislation to enable prosecution of peacekeeping personnel for such crimes committed within the territory of Haiti.²²¹

²¹⁹ The United States is not a state party to the Convention of Belém do Pará.

²²⁰ Convention of Belem do Para, Article 7 (Duties of States).

²²¹ There have been allegations surrounding peacekeeping personnel within MINUSTAH, (United Nations Stabilization Mission in Haiti) concerning sexual exploitation and patronising of prostitutes, particularly adolescent girls; BBC Newsnight special report, 'UN troops in abuse row', 30 November 2006, <http://news.bbc.co.uk/2/hi/programmes/newsnight/6196710.stm>.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa declares that

1. Every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited.²²²

The African Protocol also obliges state parties to "take appropriate and effective measures to... enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public..."²²³ African countries with a PSO in their territory should be encouraged to ratify the African Protocol and subsequently fulfil the obligations, enacting legislation that specifically allows for jurisdiction over visiting mission personnel for violence against women.

The European Convention on Human Rights guarantees such rights as the right to family and private life, the prohibition of torture or inhuman or degrading treatment, the prohibition of slavery and forced labour, and the right to liberty and security. All state parties are under the obligation "to secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention".²²⁴ Implementation of this obligation has been clarified by the European Court of Human Rights. In the case of *X and Y v the Netherlands*, the Court found that civil remedies are insufficient for the prevention of sexual abuse, and that criminal law is required to fulfil a state's obligation to secure these rights under the ECHR.²²⁵

2.4.2. Extraterritorial Application of Human Rights

The discussion above relating to states' obligations to criminalise gender-based violence by peacekeepers, and that below covering violations of rights as harms against women, show the relevance of the protection of human rights by sending states. However, this raises the question of

²²² Protocol on the Rights of Women in Africa, Article 4(1): The Rights to Life, Integrity and Security of the Person.

²²³ *Ibid.*, Article 4(2).

²²⁴ ECHR Article 1: Obligation to respect human rights.

²²⁵ *X and Y v The Netherlands* (1985) 8 EHRR 235, discussing the obligation to prevent sexual abuse in relation to Article 8.

the extraterritorial application of human rights to invoke state responsibility and ensure the protection of such rights during peacekeeping missions. The issue of the extraterritorial application of human rights is one of controversy, particularly as human rights engage state responsibility. The existence of extraterritorial application of human rights has been discussed in regional and international case law, the findings of which can be applied to peacekeeping personnel.

Jurisdiction of a state is the power of that state to govern persons and property; prescriptive jurisdiction is the right to prescribe laws, and enforcement jurisdiction is the power to enforce such laws.²²⁶ Jurisdiction has traditionally been viewed as linked to state sovereignty, and is territorial.²²⁷ However, it is also accepted that, provided there is no specific rule to the contrary, jurisdiction may be enacted extra-territorially.²²⁸

2.4.2.1. International case law

In 1996, the International Court of Justice (ICJ) held that, with the exception of the permitted derogation of certain provisions under Article 4, “the protection of the International Covenant on Civil and Political Rights [ICCPR] does not cease in times of war”.²²⁹ The Court affirmed this in 2004 in the *Israel Wall Advisory Opinion*: “More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict”.²³⁰ The Court went on to specifically address extraterritorial application of the ICCPR:

“The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the [ICCPR], it would seem natural that, even when such is the case, State parties to the Covenant should be bound to comply with its provisions... the drafter of the Covenant did not intend to

²²⁶ I. Brownlie, *Principles of Public International Law*, 7th ed., (Oxford University Press, Oxford 2008), p. 299; M. Dixon and R. McCorquodale, *Cases And Materials On International Law*, 4th ed., (Oxford University Press, Oxford 2003), p. 268; D. Harris, *Cases and Materials on International Law*, 6th ed., (Sweet & Maxwell, London 2004), p. 265.

²²⁷ *The Case of the S.S. “Lotus”, France v Turkey*, PCIJ, Ser. A, No. 10 (1927) (*Lotus Case*), pp. 18, 20; Dixon and McCorquodale, *ibid.*, p. 268.

²²⁸ *Lotus Case*, pp. 19, 20.

²²⁹ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, para. 25.

²³⁰ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 178, para. 106.

allow States to escape from their obligations when they exercise jurisdiction outside their national territory.”²³¹

It was the Court’s final conclusion that the ICCPR “is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory”.²³² A state is not to “raise any obstacle to the exercise of such rights”.²³³

A year later in the contentious decision of *DRC v Uganda*,²³⁴ the Court held that Uganda had failed to “comply with its obligations as an occupying Power... in respect of violations of international human rights law and international humanitarian law in the occupied territory”.²³⁵ However, the ruling indicates that the responsibility extended to violations committed not only in occupied territory, determining Uganda to be responsible for violations of international human rights law and international humanitarian law committed by Ugandan soldiers in the territory of the DRC.²³⁶ This was based on the fact that the “conduct of individual soldiers and officers... is to be considered as the conduct of a State organ... a party to an armed conflict shall be responsible for all acts by persons forming part of its armed forces”.²³⁷ The Court held that the conduct of the Ugandan soldiers was attributable to Uganda “by virtue of [their] military status and function”.²³⁸ According to the Court’s reasoning, a state would be accountable and responsible for human rights violations committed by its military and police whilst involved in a peacekeeping mission, as even though the mission is multi-national under the auspices of the UN, soldiers and police officers remain under the flag of their sending state. That is, the state retains a certain degree of control over their military personnel²³⁹ - including jurisdiction.

²³¹ *Ibid.*, p. 179, para. 109.

²³² *Ibid.*, p. 180, para. 111.

²³³ *Ibid.*, p. 181, para. 112.

²³⁴ *Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v Uganda)*, 19 December 2005, General List No. 116.

²³⁵ *Ibid.*, para. 220.

²³⁶ That is, not just the occupied territory; *ibid.*

²³⁷ *Ibid.*, paras. 213-214.

²³⁸ *Ibid.*, para. 213.

²³⁹ J. Cerone, 'Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations' (2006) 39 *Vanderbilt Journal of Transnational Law* 1447-1510, p. 1457.

The finding most relevant to the extraterritorial application of human rights during peacekeeping missions is found in General Comment No. 31 of the Human Rights Committee (HRC). In relation to the ICCPR, the HRC found that

“a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party... This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, *such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.*”²⁴⁰

The HRC also found in the case of *Lopez Burgos v Uruguay* that state parties could be held responsible for violations of ICCPR rights committed by state agents outside the territory of the state party, “whether with the acquiescence of the Government of that State or in opposition to it”.²⁴¹ The HRC determined “it would be unconscionable to interpret the responsibility under article 2... as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory”.²⁴² The Third Periodic Report of Belgium before the HRC in 1998 demonstrated that state practice is to apply human rights and to maintain jurisdiction, as Belgium had done in the prosecution of individual peacekeepers who committed human rights violations during their service in Somalia.²⁴³

2.4.2.2. Regional case law

The extraterritorial application of the American Declaration of the Rights and Duties of Man (the American Declaration) has been addressed by the Inter-American Commission on Human Rights (IACHR) in two 1999 cases, *Coard v United States*²⁴⁴ and *Alejandro v Cuba*.²⁴⁵ In *Alejandro*, the IACHR

²⁴⁰ Human Rights Committee, General Comment No. 31 [80] The Nature of the General Legal Obligation Imposed on State Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26 May 2004, (emphasis added).

²⁴¹ *Delia Saldias de Lopez v Uruguay*, Communication No. 52/1979, CCPR/C/OP/1 at 88 (1984), para. 12.

²⁴² *Ibid.*

²⁴³ Human Rights Committee, Summary Record of the 1707th Meeting, CCPR/C/SR.1707, 27 October 1998, para. 22. A similar finding was made with regards to Italy and crimes committed by its peacekeepers in Somalia; Human Rights Committee, Summary Record of the 1680th Meeting, CCPR/C/SR.1680, 24 September 1998, para. 22.

²⁴⁴ *Coard et al. v United States*, Case No. 10.951, Report No. 109/99, 29 September 1999.

²⁴⁵ *Alejandro et al. v Cuba*, Report No. 86/99, 29 September 1999.

held that Cuba was responsible for the actions of Cuban military pilots for the shooting down of two civilian aircraft over international waters. The IACHR stated:

“[U]nder certain circumstances the Commission is competent to consider reports alleging that agents of an OAS member state have violated human rights protected in the inter-American system, even when the events take place outside the territory of that state. In fact, the Commission would point out that, *in certain cases, the exercise of its jurisdiction over extraterritorial events is not only consistent with but required by the applicable rules...* Because individual rights are inherent to the human being, all the American states are obligated to respect the protected rights of any person subject to their jurisdiction. Although this usually refers to persons who are within the territory of a state, in certain instances it can refer to extraterritorial actions, when the person is present in the territory of a state but subject to the control of another state, generally through the actions of that state’s agents abroad.”²⁴⁶

The IACHR held that it had jurisdiction over the case even though the events took place outside the territory of Cuba, because “when agents of a state, whether military or civilian, exercise power and authority over persons outside national territory, the state’s obligation to respect human rights continues- in this case the rights enshrined in the American Declaration”.²⁴⁷

This line of reasoning was also applied in *Coard*, where the IACHR held that the jurisdiction of the Commission over extraterritorial acts is not only “consistent with but required by the norms which pertain”, including during times of armed conflict.²⁴⁸

The best known case from European human rights law is that of *Bankovic et ors v Belgium et ors*,²⁴⁹ a 2001 decision of the European Court of Human Rights (ECtHR)- best known because it seen as controversial, and even departing from other ECtHR case law.²⁵⁰ In *Bankovic*, the Grand Chamber held that the case was not admissible, as the European Convention on Human Rights (ECHR) did not

²⁴⁶ *Ibid.*, para. 23 (emphasis added).

²⁴⁷ *Ibid.*, para. 25.

²⁴⁸ *Coard*, paras. 37, 39.

²⁴⁹ *Bankovic et ors v Belgium and 16 other contracting states* (Admissibility), Application no. 52207/99, Decision of the Grand Chamber 12 December 2001.

²⁵⁰ K. Altıparmak, 'Bankovic: An Obstacle to the Application of the European Convention on Human Rights in Iraq?' (2004) 9 (2) *Journal of Conflict and Security Law* 213-251; R. Lawson, 'Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights', in Coomans and Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*, (Intersentia, Antwerp & Oxford 2004), 83-124, pp. 109-116; Cerone, 'Human Dignity', *supra* note 239, pp. 1481-1494; S. Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention' (2010) 20 (4) *European Journal of International Law* 1223-1246, pp. 1226-1230.

apply extraterritorially in the case at hand. The case was brought by victims and relatives of victims of a NATO bombing of a radio and television building in Belgrade, Serbia, who claimed that, in conducting the air strike, the NATO states had violated their human rights obligations. The Grand Chamber held that state jurisdiction is primarily territorial, and that the wording of Article 1 of the ECHR indicated that the Convention was to “reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case”.²⁵¹ It was considered that exceptional circumstances including those such as occupation were necessary to invoke extraterritorial application of the ECHR, and required a state to exercise effective control over the territory in question,²⁵² and those exceptional circumstances did not exist according to the facts of *Bankovic*.²⁵³

Other cases of the ECtHR have found a broader application of the ECHR. In *Drozdz v France*, the ECtHR held that jurisdiction is not limited to the territory of a state party; and the responsibility of a state party “can be involved because of acts of their authorities producing effects outside their own territory”.²⁵⁴ The ECtHR applied this same finding in *Loizidou v Turkey*, and gave an example of the responsibility of a state party being triggered by military action resulting in the exercise of “effective control of an area outside its national territory”.²⁵⁵ The 2004 case of *Issa v Turkey* continued this flexible approach to the extraterritorial application of the ECHR, holding that “a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the

²⁵¹ *Bankovic*, para. 61.

²⁵² *Ibid.* paras. 67-73.

²⁵³ *Ibid.*, paras. 74-82.

²⁵⁴ *Drozdz and Janousek v France and Spain*, Application no. 12747/87, Judgment 26 June 1992, para. 91. The Court referenced multiple other ECtHR cases to support this finding: “(see the Commission’s decisions on the admissibility of applications no. 1611/62, X v. the Federal Republic of Germany, 25 September 1965, Yearbook, vol. 8, p. 158; no. 6231/73, Hess v. the United Kingdom, 28 May 1975, Decisions and Reports (DR) no. 2, p. 72; nos. 6780/74 and 6950/75, Cyprus v. Turkey, 26 May 1975, DR 2, p. 125; nos. 7289/75 and 7349/76, X and Y v. Switzerland, 14 July 1977, DR 9, p. 57; no. 9348/81, W. v. the United Kingdom, 28 February 1983, DR 32, p. 190).” See Miller, *supra* note 250, pp. 1240-1242.

²⁵⁵ *Loizidou v Turkey*, Application no. 15318/89, Judgment 18 December 1996, para. 52.

territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully - in the latter State".²⁵⁶

In 2007, the ECtHR considered simultaneously the admissibility of two cases, *Behrami* and *Saramati*, which included discussion on the extraterritorial application of the ECHR during multi-national peace missions, both NATO and UN.²⁵⁷ KFOR and UNMIK were the relevant missions. The ECtHR considered it

"essential to recall at this point that [although NATO command of operational matters was 'effective'],²⁵⁸ the necessary... donation of troops by willing TCNs [troop contributing nations] means that, in practice, those TCNs retain some authority over those troops (for reasons, inter alia, of safety, discipline and accountability) and certain obligations in their regard (material provision including uniforms and equipment). NATO's command of operational matters was not therefore intended to be exclusive."²⁵⁹

However, the ECtHR ultimately found both KFOR (with powers delegated by the Security Council) and UNMIK (as a subsidiary organ of the UN created by the Security Council) to be under the ultimate command of the Security Council for operational matters, and consequently the actions and omissions in question to be attributable to the UN according to the wording of the ILC Draft Articles on the Responsibility of International Organisations.²⁶⁰ It was held that the relevant acts and omissions could thus not be attributable to the respondent state parties, and "moreover, did not take place on the territory of those States or by virtue of a decision of their authorities", as a consequence of which the case was declared inadmissible.²⁶¹

2.4.2.3. Application to Peace Support Operations

It is the case in the majority of peacekeeping operations that the operation is required "to administer interim justice either independently of, or in conjunction with, the host state because local

²⁵⁶ *Issa et ors v Turkey*, Application no. 31821/96, Judgment 16 November 2004, para. 71.

²⁵⁷ *Behrami and Behrami v France; Saramati v France, Germany and Norway*, Application Nos. 7412/01 and 78166/01, Decision of the Grand Chamber 2 May 2007.

²⁵⁸ *Ibid.*, para. 139 and 140.

²⁵⁹ *Ibid.*, para. 138.

²⁶⁰ *Ibid.*, paras. 140-143, 151. The facts of the cases concerned the death and injury of young boys due to undetonated cluster bomb units (*Behrami*, paras. 5, 61); and alleged unlawful detention and lack of access to court (*Saramati*, paras. 8-17, 62).

²⁶¹ *Ibid.*, para. 151.

authorities are unwilling or unable to exercise law and order functions”.²⁶² Such duties in maintaining law and order may include re-establishing rule of law, ensuring the criminal justice system is functional, training local police and military personnel, and assisting the government with functional duties.²⁶³ Such power or effective control has been exercised in many operations, including but not limited to East Timor, Egypt, West Irian, Congo, Cambodia, Somalia, Kosovo, and Iraq.²⁶⁴ Peacekeepers are at times involved in operations that exercise effective control, and public powers that are normally exercised by the government. Some operations operate as transitional administrative authorities, replacing the government temporarily.²⁶⁵ In such situations, human rights obligations apply extraterritorially.

It is, however, significant that the emphasis of the human rights bodies, with the exception of the *Bankovic* decision, has been that effective control over persons (and property) is sufficient for human rights obligations to be engaged, and that the effective control does not need to be over territory.²⁶⁶ In *Lopez Burgos*, the HRC specified that the relevant relationship is not “to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred”.²⁶⁷ In *Öcalan v Turkey*, the ECtHR held that Öcalan was under effective Turkish authority and control as soon as the Kenyan authorities handed him over to the Turkish officials.²⁶⁸

²⁶² B.M. Oswald, 'Model Codes for Criminal Justice and Peace Operations: Some Legal Issues' (2004) 9 (2) *Journal of Conflict and Security Law* 253-275, p. 253.

²⁶³ *Ibid.*, pp. 253-254.

²⁶⁴ *Ibid.*

²⁶⁵ Such as the UN Transitional Authority in East Timor (UNTAET), or the UN Transitional Authority in Cambodia (UNTAC).

²⁶⁶ This also distinguishes the application of human rights law from the application of the law of occupation. E.-C. Gillard, 'International Humanitarian Law and Extraterritorial State Conduct', in Coomans and Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*, (Intersentia, Antwerp & Oxford 2004), 25-40, p. 33; M. Scheinin, 'Extraterritorial Effect of the International Covenant on Civil and Political Rights', in Coomans and Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*, (Intersentia, Antwerp & Oxford 2004), 73-82, p. 76; Lawson, *supra* note 250, pp. 95 & 98; D. Cassel, 'Extraterritorial Application of Inter-American Human Rights Instruments', in Coomans and Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*, (Intersentia, Antwerp & Oxford 2004), 175-182, p. 177.

²⁶⁷ *Lopez Burgos*, para. 12.2.

²⁶⁸ *Öcalan v Turkey*, Application no. 46221/99, Judgment 12 March 2003, para. 93. This confirmed an earlier decision by the European Commission on Human Rights that authorised agents remain under the jurisdiction of a state when outside that state's territory, and bring other persons under the jurisdiction of that state when they

Even without the exercise of effective control, it would be contrary to the purpose of the ICCPR to permit a state party (through its peacekeepers as state agents) to perpetrate rights violations, even without the acquiescence of the state, simply because those violations were committed outside that state's territory. Again, the authority of the sending state in relation to discipline and accountability is pertinent. The sending state has the responsibility to discipline and hold accountable perpetrators of violations as part of its human rights obligations, because "the responsibility of the state is engaged 'insofar as' state agents affect person or property".²⁶⁹ Following the rulings of the various human rights bodies, which would deem a victim of sexual exploitation to be in the control or authority of a peacekeeper, who is a state agent, commission of a human rights violation by a peacekeeper produces a "direct and immediate link between the extraterritorial conduct of a state and the alleged violation of an individual's rights".²⁷⁰

Given the fact that international humanitarian law (and/or the law of occupation) does not always apply during a peace support operation,²⁷¹ human rights must apply to an operation in order to avoid a vacuum of rights protections for the local population. It is not expected that states secure all rights and freedoms, but they must take measures within the scope of their powers to avoid violations.²⁷² However, such expectations of preventing violations are higher in relation to fundamental rights such as the right to life, and the right to freedom from torture and inhuman and degrading treatment, due to the fact that these are non-derogable rights.

The circumstances of the European cases of *Behrami* and *Saramati* can be distinguished from a case of gender-based crime committed by a peacekeeper. The violations alleged in the case were

exercise authority over such persons; *Stocké v the Federal Republic of Germany*, Application no. 11755/85, Report of the Commission adopted 12 October 1989, para. 166.

²⁶⁹ Lawson, *supra* note 250, p. 105.

²⁷⁰ *Ibid.*, p. 104.

²⁷¹ G. Porretto and S. Vité, 'The application of international humanitarian law and human rights law to international organisations' (University Centre for International Humanitarian Law, Geneva, 2006) 1, p. 53. Administrative and policing work is not armed conflict, even as regards duties such as crowd and riot control, and therefore IHL is not applicable in a situation where the mission only entails such work, even if carried out by military forces; *ibid.*, p. 55. See e.g. the work of the first all-female peacekeeping unit working in Liberia UNMIL; T. McConnell, 'All-female unit keeps peace in Liberia', *The Christian Science Monitor*, (2007) See also discussion *infra*, Chapter 5, War Crimes.

²⁷² Lawson, *supra* note 250, pp. 106-7, 120.

attributable to official operational acts or omissions- that is, the failure of mission personnel to adequately fulfil their task of cluster bomb clearance, and the actions taken through the arrest, detention and trial of Saramati under the mission's authority. In contrast, an act of rape, sexual exploitation or sexual slavery is not an act or omission committed as part of the operation, and therefore cannot be said to be only attributable to the UN in its operational command capacity. As the ECtHR stated, 'safety, disciplinary and accountability' authority for military and police personnel rests with the sending state. The ECtHR found the UN to hold ultimate authority- and thus, responsibility- only over operational decisions, but not over those relating to safety, discipline and accountability. This delineates the areas of responsibility, demonstrating that state parties would be likely to be considered responsible for rights violations by military personnel amounting to crimes, especially when committed outside the realm of operational authority.

Applying the reasoning of decisions made by regional and international human rights bodies, a sending state remains obligated to ensure rights enshrined in the relevant instrument stay protected, as military personnel are agents of the sending state whose actions produce effects in the territory of the host state.

2.4.3. Harm to Others- Violations of Rights as Harms against Women

It has been demonstrated above that states have obligations to criminalise violence against women. It has also been shown that human rights have extraterritorial application over peacekeeping personnel under the jurisdiction of the sending state. What must now be examined are the harms against women that result from prostitution and sexual exploitation. These harms amount to violations of human rights, and such violations are, to apply the criminalisation terminology used *supra*,²⁷³ set-backs to internationally protected interests. Such violations impair the opportunities of these women "to engage in worthwhile activities and relationships, and to pursue valuable, self-

²⁷³ See *supra* text accompanying notes 159-162.

chosen, goals".²⁷⁴ Quality of life for these women is significantly reduced, and the physical integrity and well-being of the women are affected.²⁷⁵ This section will explore some of the different harms experienced by women as victims of prostitution and sexual exploitation, presenting them as violation of human rights.

One significant argument for the criminalisation of prostitution-related activities and sexual exploitation is the link to trafficking that such behaviour perpetrates. Increased demand in prostitution services and increased sexual exploitation of local women results in an augmentation of trafficking, enforced prostitution and sexual slavery,²⁷⁶ categories of violence against women that are recognised as criminal conduct.²⁷⁷ Trafficking engages organised crime syndicates, as networks of people work together to move women from one place to another, whether within one country or across state borders.²⁷⁸ It also encourages corruption in law enforcement officials working in a failed state.²⁷⁹ At a 2002 US House of Representatives hearing on the issue of sexual slavery in Bosnia, a former UN human rights investigator gave a statement that "the trafficking and forced prostitution trade is not separate from a 'legitimate' prostitution trade... anyone who is patronizing prostitution in Bosnia is supporting the sex slave trade".²⁸⁰

²⁷⁴ Simester and Sullivan, *supra* note 142, p. 10.

²⁷⁵ J. O'Connell Davidson, 'The Rights and Wrongs of Prostitution' (2002) 17 (2) *Hypatia* 84-98, p. 94.

²⁷⁶ 'So does it mean we have the rights?', *supra* note 92; sex work is linked to organised crime in general, *see* Unclassified cable, subject: Trafficking in women: turning a blind eye?, Doc_Nbr: 2000SARAJE09710, Oct 2000, Date/Case ID: 11 Aug 2003 200102920 available at <http://www.hrw.org/legacy/reports/2002/bosnia/1000cable.pdf>.

²⁷⁷ *See e.g.* Articles 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi) of the Rome Statute of the International Criminal Court, 2187 UNTS 90, entered into force 1 July 2002.

²⁷⁸ Subcommittee on International Operations and Human Rights of the Committee on International Relations, Second Session, 'The U.N. and the Sex Slave Trade in Bosnia: Isolated Case or Larger Problem in the U.N. System?' (U.S. Government Printing Office, Washington D.C., 24 April 2002) Document No. 107-85; M. Vandenberg, 'Hopes Betrayed: Trafficking of Women and Girls to Post-Conflict Bosnia and Herzegovina for Forced Prostitution' (Human Rights Watch, New York, November 2002) Vol. 14, No. 9 (D), IV. Women's and Girls' Experiences of Trafficking into the Bosnian Sex Industry, pp. 15-21; 'Trafficking, Slavery and Peacekeeping: The Need for a Comprehensive Training Program. A Conference Report.' (Transnational Crime and Corruption Centre & UN Interregional Crime and Justice Research Institute, Turin, 9-10 May 2002), pp. 9-10; Mendelson, *supra* note 99, pp. 14-17.

²⁷⁹ 'Hopes Betrayed', *ibid.*, VI. Local Police Involvement in Trafficking, pp. 26-35.

²⁸⁰ 'The U.N. and the Sex Slave Trade in Bosnia', *supra* note 278, Prepared Statement of David Lamb, former UN human rights investigator in Bosnia, p. 32.

Prostitution is a supply-demand enterprise.²⁸¹ Thus, it is incongruous to criminalise all aspects of trafficking (trafficking itself, selling of girls and women, enforced prostitution, sexual slavery and sometimes procurement), if the clientele remain free to participate without fear of consequences.²⁸² This situation produces a situation of inequity, where the women and girls are victimised many times over, (sometimes resulting in their facing criminal charges for prostitution, and if applicable, deportation),²⁸³ while the male clients act with impunity.²⁸⁴ Aside from the aim of reducing prostitution activities in general, criminalising prostitution-related activities by peacekeepers can thus effectively be a form of prevention of trafficking.²⁸⁵

However, it is not only the link to other crimes such as trafficking that demonstrates the need to criminalise prostitution activities by peacekeepers. Whether trafficked or not, the effect of prostitution and sexual exploitation on its victims is most vital to the argument in favour of criminalisation. Working in prostitution and being subject to sexual exploitation in PSO areas is a situation of violence against these women, which will be explored below. The growth of the sex industry in mission areas is one reason why prostitution activities such as procurement and patronisation should be criminalised for peacekeeping personnel, in order to stop the commercial sex trade.²⁸⁶

²⁸¹ O'Connell Davison, *supra* note 275, p. 91; M.M. Dempsey, 'Rethinking Wolfenden: Prostitute-Use, Criminal Law, and Remote Harm' (2005) June *Criminal Law Review* 444-455, p. 453; Allred, 'Peacekeepers and Prostitutes', *supra* note 89.

²⁸² Allred, 'Human Trafficking', *supra* note 109.

²⁸³ 'So does it mean that we have the rights?', *supra* note 92, pp. 20-21.

²⁸⁴ D. Pallen, 'Sexual Slavery in Bosnia: The Negative Externality of the Market for Peace' (2003) XIII (1) *Swords & Ploughshares* 27-43; J. Murray, 'Who Will Police the Peace-Builders? The Failure to Establish Accountability for the Participation of United Nations Civilian Police in the Trafficking of Women in Post-Conflict Bosnia and Herzegovina' (2003) 34 *Columbia Human Rights Law Review* 475-527; Secretary-General, 'In-depth study on all forms of violence against women: Report of the Secretary-General' (United Nations General Assembly, 6 July 2006) A/61/122/Add.1; J. Halley, et al., 'From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism' (2006) 29 *Harvard Journal of Law & Gender* 335-423.

²⁸⁵ M. Noone, 'The U.S. Approach to Combating Trafficking in Women: Prosecuting Military Customers. Could it Be Exported?' (2005) IV (4) *The Quarterly Journal* 81-89; Halley et al, *ibid*; B. Oswald and S. Finnin, 'Combating the Trafficking of Persons on Peace Operations' (2006) 10 *International Peacekeeping: The Yearbook of International Peace Operations* 1-32.

²⁸⁶ Allred, *supra* note 281; Noone, *ibid*; Halley et al., *ibid*.

Feminist debate has questioned whether prostitution itself- the act of providing sexual favours for money- constitutes violence against women *per se*.²⁸⁷ Whilst this thesis makes no comments on prostitution as violence *per se*, it is submitted that, in the circumstances existing in PSO areas, prostitution is violence against women. Prostitution in these situations amounts to an extensive amount of harms committed against women.

Prostitution and sexual exploitation violate a large number of the rights of the women and girls concerned, significantly in these particular circumstances. Rights violated include rights related to employment (such as the right to just and favourable conditions of work),²⁸⁸ freedom from discrimination,²⁸⁹ and the rights to education,²⁹⁰ liberty,²⁹¹ equality,²⁹² health,²⁹³ development,²⁹⁴ family and marriage.²⁹⁵ It may include a violation of the rights to freedom from torture and inhuman and degrading treatment,²⁹⁶ freedom from slavery,²⁹⁷ and access to justice.²⁹⁸ In extreme cases it could lead to a violation of the fundamental right to life.²⁹⁹ Reference in this section will mainly be, where applicable, to the language of the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), but also to other relevant instruments.

²⁸⁷ C. Overall, 'What's Wrong With Prostitution? Evaluating Sex Work' (1992) 17 (4) *Signs* 705-724; C.A. MacKinnon, 'Prostitution and Civil Rights' (1993) 1 *Michigan Journal of Gender and Law* 13-31; S.K. Hunter, 'Prostitution is Cruelty and Abuse to Women and Children' (1993) 1 *Michigan Journal of Gender and Law* 91-104; and Leidholdt, *supra* note 85.

²⁸⁸ Articles 23 & 24 of the Universal Declaration of Human Rights (UDHR); Article 22 of the ICCPR; Articles 6-8 of the International Covenant on Economic and Social Rights (ICESCR); Article 11 of CEDAW.

²⁸⁹ CEDAW; Article 2 of the UDHR; Articles 2 & 26 of the ICCPR.

²⁹⁰ Article 26 of the UDHR; Article 18 of the ICCPR; Article 13 of the ICESCR; Articles 28 & 29 of the CROC; Article 10 of CEDAW; UNESCO Convention against Discrimination in Education; Article 2 of Protocol 1 of the ECHR.

²⁹¹ Article 3 of the UDHR; Article 9 of the ICCPR.

²⁹² *Supra* note 289.

²⁹³ Article 25 of the UDHR; Articles 11 & 12 of the ICESCR; Article 12 of CEDAW.

²⁹⁴ Article 11 of the ICESCR; Articles 13 & 14 of CEDAW.

²⁹⁵ Article 16 of the UDHR; Article 23 of the ICCPR; Article 10 of the ICESCR; Article 16 of CEDAW.

²⁹⁶ The CAT; Article 5 of the UDHR; Article 7 of the ICCPR.

²⁹⁷ Article 4 of the UDHR; Article 8 of the ICCPR; the Slavery Convention of 1953; the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Other of 1949; the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime and other relevant conventions and treaties of 2000.

²⁹⁸ Articles 6-10 of the UDHR; Articles 14 & 16 of the ICCPR.

²⁹⁹ Article 3 of the UDHR; Article 6(1) of the ICCPR.

2.4.3.1. Employment-related Rights and Freedom from Slavery

Employment related rights are violated due to the fact that women who work as prostitutes and those who are subject to sexual exploitation are not undertaking freely chosen employment or working under just, favourable and safe conditions of work.³⁰⁰ Such women often work on the street, leaving them vulnerable to violence, as well as to the elements. Women who work in a brothel may have a room with a bed in which to service clientele, but those on the street do not, and are risking their safety by going to strange places with clients. There is no minimum wage structure for prostitution, which means that the pay may be so minimal it barely enables the woman to provide herself with a roof over her head. Should a client refuse to pay, a prostitute has no means of recovering the lost payments. Hence, the possibility of just and favourable remuneration is remote. Exploitation of labour is prominent in such situations.

The employment situation may be even worse if a woman is subject to the demands of a procurer. She has even less freedom to choose when and with whom she conducts her work. She is usually obliged to give up part of her earnings to the procurer, meaning she makes even less money. All of these factors create an unstable, unsafe and unfair working environment.

The situation is certainly no better for women working in a brothel, especially if they are victims of forced prostitution. These women are usually the victims of trafficking, and find themselves forced to work as a prostitute, having sex with a very high number of clients to pay off the debt of the cost of their purchase, with little or no pay- essentially in conditions of slavery.³⁰¹ In these situations women are coerced to stay through violence, drugs and confiscation of their passport.³⁰² If the women are trafficked from another country, fear of an unknown law and order system and lack of language skills also prevent these women from seeking help. Under these circumstances, rights to freely choose

³⁰⁰ Articles 23 & 24 of the Universal Declaration of Human Rights (UDHR); Article 22 of the ICCPR; Articles 6-8 of the International Covenant on Economic and Social Rights (ICESCR); Article 11 of CEDA; W J.E. Larson, 'Prostitution, Labor, and Human Rights' (2004) 37 (3) *U.C. Davis Law Review* 673-700.

³⁰¹ K.E. Nelson, 'Sex Trafficking and Forced Prostitution: Comprehensive New Legal Approaches' (2001-2) 24 *Houston Journal of International Law* 551-578, pp. 555-6.

³⁰² *Ibid.*, p. 555.

employment (i.e. freedom from forced labour),³⁰³ to work under favourable and safe conditions, and to just and favourable remuneration are all violated;³⁰⁴ as is the right to freedom from slavery.³⁰⁵

Women working in a brothel or for a procurer may be denied other employment-related rights as enshrined in the UDHR, namely the rights to rest periods, leisure, reasonable limitation of working hours and periodic holidays with pay.³⁰⁶ This is particularly the case in countries where prostitution is not legalised or decriminalised, as there is no system to keep a check on employment conditions. Brothel owners/managers and procurers are under no obligation to grant rest periods, holidays or to ensure working hours are reasonable, and may force women to work long hours and without rest breaks or holidays (certainly without paid holidays).

One contention that emerges in feminist debate over the legalisation of prostitution is that it represents the freedom of a woman to choose her own occupation, including sex work.³⁰⁷ However, this is not the case when it comes to prostitution in states experiencing armed conflict, law and order instability, lack of infrastructure, and poverty. Such factors are generally present in states where peacekeeping missions are present. Prostitution is not simply a 'career option' for girls and women in these circumstances, a freely chosen form of employment, but rather a desperate way for poor girls and women to pull themselves a level above abject poverty.³⁰⁸ It is not a valid choice made by these girls and women. It is 'survival prostitution'.³⁰⁹

One young prostitute in Haiti stated:

³⁰³ See Abolition of Forced Labour Convention, Convention (No. 105) Concerning the Abolition of Forced Labour, adopted on 25 June 1957 by the General Conference of the International Labour Organisation at its fortieth session, entry into force, 17 January 1959.

³⁰⁴ Nelson, *supra* note 301, p. 556.

³⁰⁵ Article 4 of the UHDR; Article 8 of the ICCPR; the Slavery Convention of 1953; the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Other of 1949; the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime and other relevant conventions and treaties of 2000.

³⁰⁶ *Ibid.*, pp. 555-6.

³⁰⁷ Cooper, *supra* note 133, p. 109.

³⁰⁸ I. Talleyrand, 'Military Prostitution: How the Authorities Worldwide Aid and Abet International Trafficking in Women' (2000) 27 *Syracuse Journal of International Law & Commerce* 151-176, p. 158.

³⁰⁹ Higate, 'Case Studies DRC & Sierra Leone', *supra* note 120, p. 15; Leidholdt, *supra* note 85, p. 136; Kent, *supra* note 86, p. 53.

“The poverty and the misery are so bad; you can get to the point of almost starving. You can’t find money for clothes or somewhere to sleep. You are forced to have sex with men to get money to eat or somewhere to sleep. At times I’ve felt so bad I’ve wanted to kill myself.”³¹⁰

2.4.3.2. Right to Education

Those who work as prostitutes or are subject to sexual exploitation or trafficking are often girls, some quite young. As a result, a woman’s right to education is habitually violated. They are denied the opportunity to undertake education, and thus to find themselves alternative employment.³¹¹ The temptation or pressure to make money to assist with family expenses may seem a more realistic option to a girl or young woman, despite the compulsory nature of elementary education and the right to free education at the elementary and fundamental stages.³¹² In a 2002 report, the International Organisation for Migration (IOM) found that a majority (57%) of 168 women and girls who had been trafficked from Moldova to Kosovo had only a basic primary education.³¹³ Education helps to make children and young adults less vulnerable, enabling them to be more aware of options and opportunities in life.

Education can also have an impact on bolstering the rights to health, liberty and security, equality, and family, and freedom from inhuman and degrading treatment.³¹⁴ It can also impact on the ability of girls and women to control and make decisions in relation to their own sexual activity, particularly in the absence of sexual health education. The Committee on Elimination of Discrimination against Women has found that:

“Adolescent girls and women in many countries lack adequate access to information and services necessary to ensure sexual health. As a consequence of unequal power relations based on

³¹⁰ BBC report on exploitation in Haiti by UN peacekeepers, *supra* note 221.

³¹¹ N. Ray, 'Looking at Trafficking Through a New Lens' (2006) 12 *Cardozo Journal of Law & Gender* 909-927, pp. 919-920.

³¹² Article 26(1) UDHR; K. Halvorsen, 'Notes on the Realization of the Human Right to Education' (1990) 12 *Human Rights Quarterly* 341-364, pp. 351-2.

³¹³ IOM Kosovo, Return and Reintegration Project, Situation Report – February 2000 to September 2002, 2002, p. 13. Cited in "So Does It Mean That We Have the Rights?", *supra* note 92, p. 11.

³¹⁴ Article 26(2) UDHR.

gender, women and adolescent girls are often unable to refuse sex or insist on safe sex and responsible sex practices.”³¹⁵

The Committee goes on to require state parties to

“ensure, without prejudice and discrimination, the right to sexual health information, education and services for all women and girls, including those who have been trafficked, even if they are not legally resident in the country.”³¹⁶

2.4.3.3. Right to Development

Violations of employment-related rights and the right to education contribute to the violation of the right to development. Developmental rights can be found in Article 11 of the ICESCR and Articles 13 and 14 of CEDAW. These articles express the right to development in terms of rights to freedom from hunger achieved by development of agrarian systems and food distribution, involvement in cooperatives and community activities, rights to financial services and recreational activities. The 1986 Declaration on the Right to Development states that “all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized”.³¹⁷

Women who find themselves in conditions of poverty in a post-conflict society, with their rights to education and employment violated, are frequently unable to contribute to the potential development and economic growth of their society and community.³¹⁸ This is particularly the case if they end up victims of sexual exploitation or working in prostitution. Nor can these women experience their own development, with poor wages, lack of education, and unfavourable working conditions. Such situations of poverty and lack of education drive women to desperate measures to support themselves and their families. The IOM report of 2002 found that over 70% of forced prostitutes from Moldova who had been trafficked considered themselves poor to very poor (earning

³¹⁵ CEDAW General Recommendation 24 (20th Session, 1999): Article 2: Women and Health, A/54/38/Rev.1 part I (1999) at para. 18.

³¹⁶ *Ibid.*

³¹⁷ Declaration on the Right to Development, A/RES/41/128, 4 December 1986.

³¹⁸ Halvorsen, *supra* note 312, p. 343.

less than USD 30 per month), and that 88% had sought to leave Moldova for the purposes of finding work, induced by promises of (non-sex) work in other countries.³¹⁹

2.4.3.4. Right to Marriage and Family

Working as a prostitute or being a victim of sexual exploitation may render it difficult for a woman to enjoy her rights to family life and marriage (freely entered into).³²⁰ It is certainly impossible if the woman is a victim of forced prostitution, where she is shut out from the world, meets other prostitutes and clients, and customarily lives in a shared room.³²¹ A poor income means little or no ability to care adequately for children.

An unwanted pregnancy may result in a fatherless child, denying both mother and child the right to family.³²² Alternatively, it may result in an unsafe termination of the pregnancy, which may in turn bring about a future inability to have children, which also causes a violation of the right to family.

In certain cultures, women who engage in prostitution or are victims of sexual exploitation may be ostracised from their society. Such rejection will often include rejection as a potential wife or partner, meaning that these women are unable to marry or found a family.³²³

2.4.3.5. Right to Health

“I felt sick, and was coughing a lot. I had a terrible headache and fever... I was lying in bed and almost fading, when the owner’s son came into my room and I was beaten badly by him. As a result, I suffered grave bodily injuries. I stayed in bed for three months. Except for other injuries, he broke my hand too. All the time I spend in bed, he repeatedly exploited me.”³²⁴

One of the most serious harms a woman experiences as a victim of sexual exploitation or when working as a prostitute is the violation of her right to health.³²⁵ This violation occurs on many

³¹⁹ 60% of surveyed women were promised work in Italy. *Supra* note 313.

³²⁰ Article 16 of the UDHR; Article 23 of the ICCPR; Article 10 of the ICESCR; Article 16 of CEDAW.

³²¹ *See e.g.* “So does it mean we have the rights?”, *supra* note 92, p. 15.

³²² Koyama and Myrtilinen, *supra* note 90, pp. 37-38.

³²³ *Ibid.*, p. 38.

³²⁴ “So does it mean we have the rights?”, *supra* note 92 p. 15.

³²⁵ Article 25 of the UHDR; Articles 11 & 12 of the ICESCR; Article 12 of CEDAW.

levels.³²⁶ Prostitutes anywhere, but particularly in poor regions are more at risk of contracting and passing on sexually transmitted infections (STIs), in particular HIV/AIDS.³²⁷ This is because poorer prostitutes (including those in poor regions) are more willing to engage in sexual intercourse without a condom, for more money. They are also at risk of being forced, through physical violence, to engage in unprotected sex. Or it may even be the case that there is simply no access to an adequate supply of prophylactics. Such harms and risks also exist in the circumstances of sexual exploitation.

In particular, a woman's right to reproductive health- and reproductive freedom- is violated.³²⁸

Despite the

"right of all persons, free of coercion, discrimination and violence, to the highest attainable standard of sexual health, including access to sexual and reproductive health care services; seek, receive and impart information related to sexuality; sexuality education; respect for bodily integrity; choose their partner; decide to be sexually active or not; consensual sexual relations; consensual marriage; decide whether or not, and when, to have children; and pursue a satisfying, safe and pleasurable sexual life",³²⁹

such rights of sexually exploited women are violated.

³²⁶ S.K. Hunter, 'Prostitution is Cruelty and Abuse to Women and Children' (1993) 1 *Michigan Journal of Gender and Law* 91-104.

³²⁷ See discussion *infra* on the harm of HIV/AIDS to both the women and the peacekeeping personnel.

³²⁸ "Reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition are the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law, and the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant. In line with the above definition of reproductive health, reproductive health care is defined as the constellation of methods, techniques and services that contribute to reproductive health and well-being by preventing and solving reproductive health problems. It also includes sexual health, the purpose of which is the enhancement of life and personal relations, and not merely counselling and care related to reproduction and sexually transmitted diseases." Programme Of Action Of The International Conference On Population And Development, Cairo, 5-13 September 1994, Chapter VII Reproductive Health, available at <http://www.unfpa.org/publications/detail.cfm?ID=275>.

³²⁹ "These working definitions were elaborated as a result of a WHO-convened international technical consultation on sexual health in January 2002, and subsequently revised by a group of experts from different parts of the world. They are presented here as a contribution to on-going discussions about sexual health, but do not represent an official WHO position, and should not be used or quoted as WHO definitions." WHO Sexual Health, definition of sexual rights, available at http://www.who.int/reproductivehealth/topics/gender_rights/sexual_health/en/.

The Committee on the Rights of the Child recognised that people “who are sexually exploited, including in prostitution... are exposed to significant health risks, including [STIs], HIV/AIDS, unwanted pregnancies, unsafe abortions, violence and psychological distress”.³³⁰ In developing countries, unsafe sex is the second most important risk factor leading to disability, disease or death.³³¹ Inequalities in access to health services and sexual coercion and exploitation are two significant obstacles to women engaging in safe sexual relationships and ensuring reproductive health.³³²

Violent, unwanted sexual encounters and STIs put a woman at risk of being unable to reproduce. A prostitute is often not free to choose with whom she engages in sex, and certainly a forced prostitute has no sexual autonomy. Victims of sexual exploitation likewise act out of necessity rather than choice. Thus such women have no freedom over their reproductive choices, especially as they are at risk of unwanted pregnancy due to lack of access to contraception. A 2002 UNICEF report on ‘Trafficking in Human Beings in Southeastern Europe’ reported that the majority of women and girls trafficked into the sex industry in Kosovo were forced to have unprotected sex, with 40% only using condoms ‘occasionally’.³³³ Unwanted pregnancy can in turn lead to abortions, which if not conducted with adequate healthcare facilities and properly trained staff, can lead to infections, potential inability to reproduce, risks in future pregnancies, and in extreme cases, death.³³⁴ Women in areas such as South America and West and East Africa are more likely to engage in unsafe abortions which produce such risks.³³⁵ Those who continue with the pregnancy risk complications during the pregnancy and childbirth, which may also lead to serious disability or even death.³³⁶

³³⁰ CRC General Comment 4 (Thirty-third session, 2003): Adolescent Health and Development in the Context of the Convention on the Rights of the Child, A/59/41 (2004) 102 at para. 37.

³³¹ A. Glasier, et al., 'Sexual and reproductive health: a matter of life and death' (2006) 368 (9547) *The Lancet* 1595-1607, p. 1597.

³³² *Ibid.*, p. 1596.

³³³ 'Trafficking in Human Beings in Southeastern Europe: Current Situation and Responses to Trafficking in Human Beings' (UNICEF, UNOHCHR, OSCE ODIHR, 2002) , p. 96.

³³⁴ D.A. Grimes, et al., 'Unsafe abortion: the preventable pandemic' (2006) 368 (9550) *The Lancet* 1908-1919, pp. 1910-1911.

³³⁵ *Ibid.*

³³⁶ Glasier, *supra* note 331, p. 1597.

Physical violence, STIs, HIV/AIDS and unwanted pregnancies are often exacerbated by lack of access to health care.³³⁷ This is particularly the case for forced prostitutes, who have no ability themselves to find health care and are subject to the whims of their captors.³³⁸ For example, UNICEF's 2002 report found that 36% of trafficked women in Kosovo were denied healthcare, and only 10% had access to regular health care.³³⁹

2.4.3.6. Freedom from Torture and Inhuman and Degrading Treatment

"We worked from 9am to 11pm. After that he said, 'You do what you like', but we were locked. When we asked to go out he said, no, that we had to be here. We slept in a room together, me and another girl. All the windows had bars. He didn't ever beat me; it was just psychological threats. We were coerced in that way; I couldn't go out."³⁴⁰

The right to freedom from torture and inhuman and degrading treatment³⁴¹ is a non-derogable, fundamental right.³⁴² States have the obligation to "protect both the dignity and the physical and mental integrity of the individual".³⁴³ It is submitted that the acts of prostitution and sexual exploitation committed by peacekeepers amount to inhuman and/or degrading treatment. Being paid to carry out sexual favours by men; being regarded as less than human (like property),³⁴⁴ being at the mercy of these men, having to do as the men wish, sometimes involving violent situations, amounts to inhuman and degrading treatment.³⁴⁵ Sexual exploitation is degrading- that is, being so poor that you are reduced to trading sex for money, food or other goods. "There is no dignity in poverty, which denies the person full powers of agency. Yet the right to sell one's labor (sexual or

³³⁷ *Ibid.*, pp. 1597, 1601.

³³⁸ Mendelson, *supra* note 99, p. 9.

³³⁹ UNICEF, 'Trafficking in Human Beings in Southeastern Europe', 2002, *supra* note 333, p. 96.

³⁴⁰ Romanian woman trafficked into Kosovo and held as a forced prostitute in a brothel; "So does that mean we have the rights?", *supra* note 92, p. 15.

³⁴¹ The CAT; Article 5 of the UDHR; Article 7 of the ICCPR

³⁴² A.-M. Bolin Pennegård, 'Article 5', in Alfredsson and Eide (eds.), *The Universal Declaration of Human Rights*, (Martinus Nijhoff Publishers, The Hague 1999), 121-146, p. 127; ICCPR General Comment 20 (1992), *supra* note 202, para. 3.

³⁴³ ICCPR General Comment 20 (1992), *supra* note 202, para. 2.

³⁴⁴ "The [trafficked women] weren't held in any regard at all. Sex isn't even the word for it... I've never experienced anything as base as this." Statement by former US peacekeeper referring to the treatment of Ukrainian and Moldovan women by Russian peacekeepers in Bosnia; Mendelson, *supra* note 99, p. 52.

³⁴⁵ See Leidholdt, *supra* note 85, and O'Connell Davidson, *supra* note 275, pp. 87 & 91.

otherwise) does not guarantee the restitution of dignity or moral agency.”³⁴⁶ “Buying a woman’s body is as much a violation of her human dignity as selling it.”³⁴⁷ Women who are victims of trafficking and forced prostitution experience inhuman and/or degrading treatment, which may include beatings, being forced to have sex at gunpoint, starvation, death threats against their children, and being locked in a dark room.³⁴⁸ Violence experienced by sexually exploited women can also be considered torture, depending on the circumstances surrounding the violence.

2.4.3.7. Right to Life

Such physical violence also puts a sexually exploited woman at risk of having her most fundamental right: her right to life.³⁴⁹ This is also at risk when a woman engages in unprotected intercourse, placing her at risk of contracting HIV/AIDS.³⁵⁰ STIs, including HIV/AIDS, and pregnancy and childbirth complications are highly contributing factors to death in women in developing countries.³⁵¹

2.4.3.8. Access to Justice

Access to effective remedies,³⁵² including criminal accountability of perpetrators and victims’ compensation, is difficult for victims of peacekeeper misconduct. Difficulties faced by victims include a culture of impunity, language barriers, lack of information and education on where to go for help, lack of income to enact and continue a legal process, and discrimination.³⁵³ This is something which has been recognised by the UN and is being addressed, but the success of proposed regulations and systems remains to be seen.³⁵⁴ In addition, even if prostitution is legal or decriminalised in a

³⁴⁶ O’Connell Davidson, *ibid.*, p. 94.

³⁴⁷ Leidholdt, *supra* note 85, p. 145.

³⁴⁸ “So does that mean we have the rights?”, *supra* note 92, pp. 15-17.

³⁴⁹ Article 3 of the UHDR; Article 6(1) of the ICCPR. Hunter, *supra* note 326, pp. 94-95.

³⁵⁰ See further discussion *infra* on HIV/AIDS.

³⁵¹ Glasier, *supra* note 331.

³⁵² Articles 6-10 of the UDHR; Articles 14 & 16 of the ICCPR.

³⁵³ C.R. Miller and N. Haltiwanger, 'Prostitution and the Legalization/Decriminalization Debate' (2004) V *Georgetown Journal of Gender and the Law* 207-242, pp. 227-229.

³⁵⁴ See *infra* Chapter 3.

particular state, legalisation is no guarantee that a prostitute will be given full access to justice within the legal system, and may even lead to over-regulation of the industry.³⁵⁵

2.4.3.9. Freedom from Discrimination

All of these harms are exacerbated by the violation of freedom from discrimination.³⁵⁶ These women are working as prostitutes and being sexually exploited because they are women- because men demand that women be available by payment for the provision of sexual services for men. The Declaration on the Elimination of Violence against Women recognises

“that violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men”.³⁵⁷

It is this domination which provides for the vast increase in prostitutes working in the PSO regions. These women are denied safe and just jobs because they are women, and the demand for their services is perpetrated by men.

The expansion of prostitution has repercussions beyond the victims. It creates an atmosphere of disrespect for and discrimination against women generally within the society, where men (and perhaps even those women who are not sexually exploited and do not work as prostitutes) view the majority of women as indecent, as whores.³⁵⁸ These attitudes make it difficult for women to grab a foothold in the rebuilding of society, and to hold important, influential roles within the community. It also prevents women from being involved in the economic development of society.

The examples of rights violations show the harm that sexually exploitative conduct by peacekeepers visits upon its female victims. Such harms violate rights across the spectrum, from fundamental rights

³⁵⁵ See e.g. M. von Galen, 'Prostitution and the Law in Germany' (1996) 3 *Cardozo Women's Law Journal* 349-376; J. Halley, et al., 'From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism' (2006) 29 *Harvard Journal of Law & Gender* 335-423, pp. 395-405.

³⁵⁶ CEDAW; Article 2 of the UDHR; Articles 2 & 26 of the ICCPR.

³⁵⁷ Preamble.

³⁵⁸ Leidholdt, *supra* note 85, p. 135.

such as the rights to life and freedom from torture and inhuman and degrading treatment, to economic and social rights such as the right to development. The resulting harm is sufficient to justify criminalisation, that is, “the behaviour in question is sufficiently serious to warrant intervention by the criminal law”.³⁵⁹

2.4.4. Harm to Others and Paternalism- Sexually Transmitted Infections and HIV/AIDS

There is also a legal paternalism argument for criminalisation of prostitution-related activities and sexual exploitation.³⁶⁰ This relates to the potential health harms that arise from the indiscriminate sexual relations peacekeeping personnel engage in with prostitutes and with other women in cases of sexual exploitation. There is a long history of problems with sexually transmitted infections (STIs) within the military when stationed overseas.³⁶¹ This risk is especially prominent in PSOs located in regions with high levels of HIV/AIDS, such as sub-Saharan Africa.³⁶² These high levels of AIDS and HIV infection mean that engaging in sexual relations with a member of the local population carries a formidable risk of contracting the virus. Engaging in sexual relations with multiple partners means personnel also risk disseminating the virus further amongst the local population, putting more women at risk of contracting HIV. At the end of a tour of duty, an infected member will then return home, where the possibility exists of spreading the virus globally.

³⁵⁹ Lord Mostyn, *supra* note 153.

³⁶⁰ As with the moralist arguments (*see infra*), paternalist reasons are not enough in themselves enough to justify criminalisation, but do support the overall reasoning for criminalisation.

³⁶¹ See, e.g. E.N. Chang, 'Engagement Abroad: Enlisted Men, U.S. Military Policy and the Sex Industry' (2001) 15 *Notre Dame Journal of Law, Ethics & Public Policy* 621-653, pp. 632-634; S. Sun, 'Where the Girls Are: The Management of Venereal Disease by United States Military Forces in Vietnam' (2004) 23 (1) *Literature and Medicine* 66-87; L.C.T.B. Turner, 'The Suppression of Prostitution in Relation to Venereal Disease Control in the Army' (1943) 7 *Federal Probation* 8-11; Moon, *supra* note 109K.H.S. Moon, *Sex among Allies: Military Prostitution in U.S.-Korea Relations*, (Columbia University Press, New York 1997); and J.S. Goldstein, *War and Gender: How Gender Shapes the War System and Vice Versa*, (Cambridge University Press, Cambridge 2001), pp. 339-342.

³⁶² For example, “Sub-Saharan Africa has just over 10% of the world’s population, but is home to more than 60% of all people living with HIV... In 2005, an estimated 3.2 million people in the region became newly infected, while 2.4 million adults and children died of AIDS.” www.unaids.org “Some 1.7 million [1.4 million-2.4 million] people were newly infected with HIV in 2007, bringing to 22.5 million [20.9 million-24.3 million] the total number of people living with the virus. Unlike other regions, the majority of people (61%) living with HIV in sub-Saharan Africa are women.” Key facts by region – 2007 AIDS Epidemic Update, http://www.unaids.org/en/HIV_data/2007EpiUpdate/default.asp. By the end of 2008, there were 22.4 million people infected with HIV in Sub-Saharan Africa; “Sub-Saharan Africa is the region most affected and is home to 67% of all people living with HIV worldwide and 91% of all new infections among children”; 2009 AIDS Epidemic Update, http://data.unaids.org/pub/Report/2009/2009_epidemic_update_en.pdf.

The issue of STIs, and in particular, HIV/AIDS is one that is linked to both prostitution and sexual exploitation. The problem is also linked, of course, to acceptable and appropriate sexual behaviour, but becomes even more far-reaching and significant when considered in relation to peacekeeping personnel. HIV/AIDS is in fact, a contributing reason to why sexual exploitation and commercial sex related activities should be criminalised. This is because peacekeepers, particularly the military personnel involved in a PSO, are a high risk group for contracting (and spreading) HIV/AIDS.³⁶³

There are several reasons for this. A large number of military personnel are young men, single, who partake in casual sex.³⁶⁴ This propensity to engage in casual sex is greater when posted abroad, an experience seen as 'adventurous' and 'exotic'. Personnel are in a situation of 'instability'. By this it is meant not just the climate of political instability, but rather finding themselves in a situation contrary to a stable home life where 'normal' relationships are possible. Thus, there is a high tendency for those posted abroad to spend time in bars, meeting women with whom they engage in casual sex. This behaviour is made all the easier by the significant amount of disposable income that peacekeeping personnel find themselves with.³⁶⁵

This situation can be exacerbated if there is a lack of other recreational activities for personnel to engage in. If there are no or few provisions for leisure time within the mission, personnel are forced to seek recreational activities elsewhere, which inevitably is in places such as bars and nightclubs. Units or battalions that find themselves with an early curfew, and living in barracks equipped with excellent provisions for recreational activities find themselves with a greater sense of camaraderie, but also are far less subject to the boredom that could drive them to bars and nightclubs.³⁶⁶ Creating such positive living conditions is even more important given that personnel are often only permitted

³⁶³ V. Kent, 'Protecting civilians from UN peacekeepers and humanitarian workers: Sexual exploitation and abuse', in Aoi, et al. (eds.), *Unintended Consequences of Peacekeeping*, (United Nations University Press, Tokyo, New York, Paris 2007), 44-66, p. 53.

³⁶⁴ See UNAIDS, 'On The Front Line: A review of policies and programmes to address HIV/AIDS among peacekeepers and uniformed services', 2003, Copenhagen, Doc. UNAIDS/03.44E; and M. Foreman, 'Combat AIDS: HIV and the World's Armed Forces' (Healthlink Worldwide, London, 2002), pp. 7-8.

³⁶⁵ Not having to budget for such costs as rent or bills, personnel often find themselves with more disposable income than they may have at home. It is also significantly more in terms of cost of living in mission countries, given that personnel are not paid in local currency, but usually in US dollars or their own national currency.

³⁶⁶ Higate, 'Case Studies: DRC & Sierra Leone', *supra* note 120, p. 45.

leave after months of service in the mission (the exact amount of time varies, depending on a range of factors).

There are other factors which render peacekeepers as a high risk group to contract HIV. These factors centre on the high risk partners that peacekeepers engage in sex with. The locations of peacekeeping missions are in countries facing instability, poverty and a lack of adequate education and healthcare. Subsequently a high rate of HIV often exists within the local population. A prime example of this is Sub-Saharan Africa, where there are currently seven PSOs currently located.³⁶⁷ Sub-Saharan Africa has one of the highest rates of HIV/AIDS in the world, and the majority (61%) of Sub-Saharan Africans infected with HIV are women.³⁶⁸ This risk is exacerbated by the fact that peacekeepers are most often engaging in sex with commercial sex workers and women who carry out survival sex, who are in themselves a high risk group due to the frequency and multiplicity of sexual partners they have. It is naïve to deny that use of prostitutes elevates the risk of STIs, in particular, HIV/AIDS. The Committee on Elimination of Discrimination against Women found that “women in prostitution are particularly vulnerable to” HIV/AIDS and other sexually transmitted diseases.³⁶⁹ According to UNAIDS, “[t]he risk of infection is highest where sex workers are most powerless and therefore unable to negotiate or insist on the use of condoms by their clients, or to resist violent and coercive sex.”³⁷⁰ For example, in the Ethiopian region of UNMEE,³⁷¹ around the area where the PSO is located, more than 70% of commercial sex workers were found to be HIV positive.³⁷²

³⁶⁷ United Nations Mission in the Central African Republic and Chad (MINURCAT), African Union-United Nations Hybrid Operation in Darfur (UNAMID), United Nations Mission in the Sudan (UNMIS), United Nations Operation in Côte d'Ivoire (UNOCI), United Nations Mission in Liberia (UNMIL), United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), and United Nations Integrated Office in Burundi (BINUB) (BINUB is a political mission administered by the DPKO); <http://www.un.org/en/peacekeeping/currentops.shtml#africa>.

³⁶⁸ *Supra* note 362.

³⁶⁹ CEDAW General Recommendation 24 (20th Session, 1999): Article 2: Women and Health, A/54/38/Rev.1 part I (1999) at para. 18.

³⁷⁰ UNAIDS, Sex workers and clients, http://www.unaids.org/en/Issues/Affected_communities/sex_workers_and_clients.asp.

³⁷¹ United Nations Mission in Ethiopia and Eritrea.

³⁷² 'U.N. Peacekeeping: United Nations Faces Challenges in Responding to the Impact of HIV/AIDS on Peacekeeping Operations' (United States General Accounting Office, Washington, D.C., 12 December 2001) GAO-02-194, p. 9.

While it may be argued that criminalisation of prostitute-related sex and sexual exploitation with regards to HIV prevention would only be necessary in missions located in high-level HIV regions, this is not the case. Firstly, the spreading nature of the virus means that it is not possible to predict where the virus will increase in vast numbers. Factors such as current infection rate, commonness and effectiveness of preventative actions, availability of health care and general attitudes towards prevention all contribute to this uncertainty. One example of this is India, which in 2006 became the country with the second highest HIV rate after South Africa.³⁷³ Regions such as Eastern Europe and Central Asia are also showing a dramatic rise in the number of people infected.³⁷⁴

In addition, it has been demonstrated that peacekeepers have actually contributed to the spread of HIV through their high levels of casual sex with commercial sex workers and local women. Cambodia is a prime example of this. UNAMIC³⁷⁵ arrived in Cambodia in 1991, and was subsumed by the larger UNTAC³⁷⁶ in 1992. At that point, HIV had only just been detected in donated blood in 1991. However, from that point, HIV levels rose dramatically. UNTAC's mandate ended in 1993. UNAIDS reports as follows:

"HIV prevalence among national adult population in Cambodia has declined to 1.9% in 2003. There were an estimated 123,100 people living with HIV/AIDS in 2003 with prevalence rate among women showing a steady rise.

Cambodia's 2003 HIV Sentinel Surveillance (HSS) found that there was a larger decline among young female sex workers compared with those older than 20 years. The reasons for this are twofold: increasing mortality and a decline in HIV incidence which, according to recent estimations, fell steeply between 1994 and 1998, before stabilizing (NCHADS, HSS 2003)."³⁷⁷

³⁷³ The figure of over 5 million people infected with the virus is only an estimate, and the number of infected people in the population may even be greater. UNAIDS Country Report 2006- India, 'Overview of the AIDS Epidemic', p. 4, available at http://data.unaids.org/pub/Report/2006/2006_country_progress_report_india_en.pdf.

³⁷⁴ UNAIDS, Regions, 'Eastern Europe and Central Asia', at <http://www.unaids.org/en/Regions/Countries/Regions/EasternEuropeAndCentralAsia.asp>; 2007 AIDS Epidemic Update- Key facts by region, http://www.unaids.org/en/HIV_data/2007EpiUpdate/default.asp; 2009 AIDS Epidemic Update, Eastern Europe and Central Asia- Latest epidemiological trends, http://data.unaids.org/pub/FactSheet/2009/20091124_FS_eeca_en.pdf.

³⁷⁵ A small mission, the United Nations Advance Mission in Cambodia.

³⁷⁶ United Nations Transitional Authority in Cambodia.

³⁷⁷ UNAIDS Cambodia, HIV/AIDS Situation, at <http://www.un.org.kh/unaids/default.asp?pageID=2>.

It is interesting to note that HIV incidence among female sex workers only began to decline in 1994, after the departure of UNTAC in late 1993. As stated previously, between 1992 and 1993, the number of prostitutes in Cambodia rose from 6,000 to 25,000.³⁷⁸ All of these figures demonstrate the link between peacekeepers' involvement with prostitutes, and HIV/AIDS. It has been acknowledged by the US government that "the rapid spread of HIV/AIDS in Cambodia coincided with the U.N. peacekeeping mission".³⁷⁹ In fact, in one survey by UNAIDS, it was found that 45% of Dutch peacekeepers had engaged in sexual activity with commercial sex workers or local women over the course of their five month deployment to UNTAC in 1993.³⁸⁰ The same US governmental report also attested to the fact that "increased rates of HIV infection in East Timor coincided with the presence of U.N. peacekeepers".³⁸¹

Women may increase their risk of HIV by engaging in intercourse with peacekeepers from countries with a high prevalence of HIV. They may become infected from these sexual encounters, and in turn infect other peacekeepers. A study in 2001 found that approximately 14% of peacekeepers came from countries with HIV prevalence within the general population of over 5%.³⁸² From available statistics, it is generally the case that HIV prevalence within the military is twice that of prevalence in the general population, which means that HIV prevalence amongst these peacekeepers may be over 10%.³⁸³

An example of contrasts is Nigeria, which consistently ranks in the top 10 of contributing troop states.³⁸⁴ Nigeria is located in Sub-Saharan Africa. It is estimated that up to 5.6% of the general adult

³⁷⁸ *Supra* note 91.

³⁷⁹ 'U.N. Peacekeeping: United Nations Faces Challenges', *supra* note 372, p. 24.

³⁸⁰ *Ibid.*, p. 10.

³⁸¹ *Ibid.*

³⁸² UNAIDS, 'On the front line', *supra* note 364, pp. 6-7.

³⁸³ *Ibid.* Examples of figures comparing general population prevalence and military prevalence include Angola (general population 5.5%; military 50%); DRC (general population 4.9%; military 50%); Malawi (general population 15%; military 50%). General population figures from 2002; military figures from 1999. Figures are difficult to obtain as armed forces do not necessarily conduct regular testing, and if they do, are not always willing to release results publicly. *See ibid.*, p. 5.

³⁸⁴ In 2001, Nigeria ranked 3rd, with 3,446 peacekeepers. *Ibid.*, p. 22. In January 2007, they were ranked 9th, with 2,468 peacekeepers. *See* Ranking of Military and Police Contributions to UN Operations, Monthly Report 31 January 2007, available at http://www.un.org/Depts/dpko/dpko/contributors/2007/jan07_2.pdf.

population aged between 15 and 49 is infected with HIV.³⁸⁵ These figures are even higher for the Nigerian military; however Nigeria has a pre-deployment testing policy, thus reducing the chance of infected personnel being deployed on a mission.³⁸⁶ However, a study of 653 peacekeepers showed 48% had engaged in sex whilst on mission,³⁸⁷ and despite years of education, Nigerian soldiers continue to engage in unsafe sex.³⁸⁸ Despite the fact that pre-deployment education and testing is conducted, this study demonstrates the high level of peacekeepers engaging in this behaviour, and consequently that they are putting themselves into a high risk group for contracting HIV, particularly if practicing unsafe sex.

Currently, the UN policy in relation to HIV-infected personnel on peacekeeping missions is that of non-discrimination. That is, the UN does not require mandatory HIV testing of personnel prior to deployment. Consistent with a general policy of non-discrimination applicable to UN staff, the UN does not prohibit HIV-positive personnel from engaging in PSOs.³⁸⁹ It does recommend that HIV-positive personnel not be deployed on missions. However, this is based principally on health-related reasons. Firstly, prior to deployment, personnel may be subject to multiple vaccinations, some of which can cause health problems for a person infected with HIV. More importantly, the UN stresses the issue of lack of access to adequate health care. PSOs are generally located in countries with sub-standard health care systems, and the missions themselves are not set up to cater for the provision of any severe or long-term health care which a person infected with HIV may require. Finally, the UN discourages deployment of HIV positive personnel in accordance with its policy of HIV prevention. This recommendation aims to minimise the risk of HIV transmission to the local population.

Henceforth, it is the choice of the sending state as to whether they allow HIV positive personnel to be deployed on PSOs. Policies within national militaries vary significantly. Some countries employ mandatory testing, others do not. Some may carry out mandatory testing only of recruits, such as the

³⁸⁵ UNAIDS, Nigeria- HIV and AIDS Estimates, *available at* <http://www.unaids.org/en/Regions/Countries/Countries/nigeria.asp>.

³⁸⁶ UNAIDS, 'On the Front Line', *supra* note 364, p. 7.

³⁸⁷ *Ibid.*, p. 5.

³⁸⁸ Forman, *supra* note 364, p. 46.

³⁸⁹ *Ibid.*, pp. 5-6. *See also* UNAIDS, 'On the Front Line', *supra* note 364, p. 14.

United States, and others may conduct mandatory testing of personnel on a regular basis. Thus, it is not possible to determine which contingents in a mission may have HIV positive personnel.

It cannot be doubted that education covering prevention and awareness is vital, and should not only be continued, but increased.³⁹⁰ However, behavioural change is hard to implement to a 100% standard. For example, even within the US Armed Forces, despite years of guidance and instruction, condom use is under 45%.³⁹¹ The Department of Defense aims to increase this to 50%, which although an improvement on 45%, is obviously nowhere near 100%.

Given the enormity of the problem of HIV in relation to peacekeepers, criminalisation of procurement of prostitutes, patronising commercial sex workers, and sexual exploitation would contribute to the effort to reduce the spread of HIV infection. Education alone appears not to work. Personnel would be less likely to engage in conduct that is illegal, and this would decrease the occurrences of peacekeepers having sex with prostitutes or engaging in sexual exploitation. This in turn will reduce opportunities for HIV transmission, which results in harm to the victim- in this case, identifiable as the woman (harm to others) or the peacekeeper (harm to self).³⁹²

It may be argued that criminalising such sexual relations is criminalising behaviour that is merely the risk of harm of HIV/AIDS, rather than the harm itself.³⁹³ However, if one of the sexual partners is HIV positive or has AIDS, whether this fact is known or not, the act of sexual intercourse is in fact the act that causes the harm- the infection of the other person with HIV (or applicable STI). Even if classified as 'merely' endangerment, endangerment is sufficient for criminalisation in exceptional circumstances,³⁹⁴ which HIV/AIDS is. For paternalistic reasons to be applied as the justification for criminalisation, very serious harm must result from the conduct. The harm must justify restrictions

³⁹⁰ For discussions on prevention and awareness training, see UNAIDS, 'On the Front Line', *supra* note 364, pp. 11-23; and Foreman, *supra* note 364, pp. 37-48.

³⁹¹ Figures from 2002. Foreman, *supra* note 364, p. 46. However it must be noted that this statistic is not accompanied by detailed information about the status of survey participants, i.e. whether participants were engaging in casual sex, or in a monogamous relationship.

³⁹² Thus there are direct, identifiable victims; Persak, *supra* note 152, p. 65.

³⁹³ Husak, *supra* note 163, p. 37.

³⁹⁴ Persak, *supra* note 152, p. 45.

placed on personal autonomy.³⁹⁵ HIV/AIDS is a very serious harm, as it ultimately results in death,³⁹⁶ and, as peacekeepers are in a high risk group, there is a substantial risk in such harm arising from peacekeepers engaging in sexual exploitation and sexual relations with prostitutes. Such high risk factors and the seriousness of the harm justify the criminalisation of this behaviour, on both grounds of harm to others and paternalism.

2.4.4.1. *Prima Facie Argument in Favour of Criminalisation*

The sections above demonstrate the *prima facie* argument in favour of criminalisation of prostitute-related activities and sexual exploitation by peacekeepers. Not only do states have an obligation under international human rights law to ensure such behaviour is criminalised, but it is clear that such conduct is harmful, particularly to the female victims, but, as seen in the paternalism argument, can also result in harm to the perpetrators themselves. The harm resulting from the conduct explored has negative effects on women's abilities and opportunities to "engage in worthwhile activities and relationships, and to pursue valuable, self-chosen goals".³⁹⁷ Such conduct is undoubtedly worthy of condemnation, and thus should be punished.³⁹⁸

However, criminalisation should only be the *ultima ratio*- the last resort in legislative action. Thus, it must also be considered whether alternative forms of regulation are or would be a viable option to prevent and/or punish violence against women by peacekeepers. The remainder of this chapter will examine whether alternative forms of regulation have been, are, or would be effective in dealing with the conduct. Chapter 3 will examine this further, and will also address problems that have arisen in relation to the enforcement of such offences in practice. The value of alternative forms of regulation needs to be considered, and whether such regulations have limitations that result in a low level of deterrence, which can be increased through criminal proscription of the relevant conduct.

³⁹⁵ *Ibid.*, p. 18.

³⁹⁶ The same paternalistic reason is used for the justification of criminalisation of suicide, as it results in death.

³⁹⁷ Simester and Sullivan, *supra* note 142, p. 10.

³⁹⁸ Husak, *supra* note 163, p. 27.

2.4.5. Alternative Forms of Regulation- Codes of Conduct

In the above sections, it has been shown that peacekeepers engaging in such conduct as sexual exploitation and sexual relations with prostitutes results in harm, particularly to the women. It must now be considered whether “the mischief could be dealt with under existing legislation or using other remedies”.³⁹⁹ Alternative forms of regulation will thus be addressed. The present chapter will examine codes of conduct, at both the national and the UN level. The subsequent chapter will be dedicated to analysing the alternative forms of regulation in place and proposed by the UN, demonstrating the need and support for criminal accountability for peacekeepers.

2.4.5.1. National Codes of Conduct

Many armed forces around the world function according to a code of conduct. A code of conduct is set of rules or regulations intended to be followed as a behavioural guide. Those who follow it consider the code when making decisions and taking actions in every aspect of their life. It is intended to apply both to working situations and those outside of the work environment, as all behaviour reflects on the person and on the institution. It is essentially a “moral” guide for behaviour, but violation of the code can often result in military discipline.

The first code of conduct that military personnel will follow is their national armed forces code of conduct, if one exists. Not all defence forces have a code of conduct. Some paradigms of codes of conduct that will be examined here are the United States, South Africa, and Canada. Some codes are very general in content, while others are more specific and refer to the law of armed conflict. Codes of conduct can be social codes governing personal relationships,⁴⁰⁰ or codes directed specifically at behaviour of forces serving in another country.⁴⁰¹

³⁹⁹ Lord Mostyn, *supra* note 153.

⁴⁰⁰ The United Kingdom has a Code of Social Conduct, which aims to enforce policy on “social misbehaviour”, including but not limited to “unwelcome sexual attention in the form of physical or verbal conduct; over-familiarity with the spouses or partners of other Service personnel; displays of affection which might cause offence to others; behaviour which damages or hazards the marriage or personal relationships of Service personnel or civilian colleagues within the wider defence community; and taking sexual advantage of subordinates”. See Armed Forces Code of Social Conduct: Policy Statement, available at <http://www.mod.uk/DefenceInternet/AboutDefence/WhatWeDo/Personnel/EqualityAndDiversity/ArmedForcesCodeOfSocialConductPolicyStatement.htm>.

The Code of Conduct for Members of the United States Armed Forces (USAF) has only six regulations, and mentions nothing about adherence to either international law or US law, apart from the concept of treason. Mention is only made of soldiers' obligations when they are taken as a prisoner of war. There is no reciprocal reference as to how prisoners of war captured by the USAF should be treated. The Code is centred on surrender and capture of USAF personnel, as well as patriotic statements about "fighting in the forces which guard my country and our way of life... I will trust in my god and in the United States of America".⁴⁰² There is no reference at all to the law of armed conflict, or to any prohibition of unacceptable social behaviour such as abuse of power, sexual offences, or corruption.

Both the Canadian and the South African Codes of Conduct are more detailed. The Canadian Code of Conduct deals only with the law of armed conflict rather than general behaviour, while the South African version covers both areas. The purpose of the Code of Conduct for CF (Canadian Forces) Personnel is "to provide simple and understandable instructions to ensure that CF members apply as a minimum, the spirit and principles of the Law of Armed Conflict in all CF operations other than Canadian domestic operations".⁴⁰³ CF personnel are required to "know and faithfully comply with these eleven rules",⁴⁰⁴ because they are based on the law of armed conflict and following the rules will enable personnel to "the armed forces to achieve legitimate military objectives while ensuring operations are carried out in accordance with the Law of Armed Conflict".⁴⁰⁵ The Code of Conduct is applicable in full during PSOs, at which time the CF applies, "as a minimum, the spirit and principles

The Australian Defence Force has a similar social code, and national anti-discrimination legislation is applied with the ADF. See Defence Fairness and Resolution available at <http://www.defence.gov.au/fr/default.htm> in general and <http://www.defence.gov.au/fr/RR/unacceptablebehaviour.htm> for Defence Instructions (General) 35-3 covering "Unacceptable behaviour", including harassment, discrimination, abuse of power, inappropriate relationships and associated behaviour, sexual offences and indecency.

⁴⁰¹ Such as the Norwegian Forces Code of Conduct, which is "based on military codex, national and international law, as well as agreements and declarations ratified and adopted by Norwegian authorities". See O.W. Erichsen, 'CHOD's Code of Conduct for Norwegian personnel serving abroad', *Forsvarets Skolesenter*, (2006)

⁴⁰² Code of Conduct for Members of the United States Armed Forces, Executive Order 10631 of 17 August 1955, available at www.au.af.mil/au/awc/awcgate/readings/code_of_conduct2.htm

⁴⁰³ National Defence, Office of the Judge Advocate General, Code of Conduct for CF Personnel, document number B-GG-005-027/AF-023, available at <http://www.cfd-cdf.forces.gc.ca/sites/page-eng.asp?page=3483>.

⁴⁰⁴ *Ibid.*

⁴⁰⁵ *Ibid.*

of the Law of Armed Conflict in all Canadian military operations other than Canadian domestic operations”.⁴⁰⁶

The significant operational advantage of having one Code applicable to all operations is that there is only one standard to train to. Furthermore, should a CF operation shift from peace support to armed conflict, the Code would continue to apply. It does require CF members however, to understand and be able to apply the eleven rules of the Code to their specific operation.⁴⁰⁷

The Code of Conduct for CF Personnel covers such rules as: humane treatment of detainees, prohibition of abuse and torture, and to abide by the laws of armed conflict, taking all steps to stop breaches and report breaches.⁴⁰⁸

The Code of Conduct for Uniformed Members of the South African National Defence Force⁴⁰⁹ (SANDF) is even more detailed than the CF Code of Conduct. There are 25 rules in the SANDF Code of Conduct, and it covers both general behaviour and the law of armed conflict. The Code refers to serving with such qualities as dignity, honour, loyalty, integrity and courage. It even refers to concepts of democracy and political neutrality. The Code requires personnel to take personal responsibility for their action. Personnel are prohibited from abusing their “authority, position or public funds for personal gain, political motive or any other reason”. They must “treat all people fairly and respect their rights and dignity at all times, regardless of race, ethnicity, gender, culture, language or sexual orientation”, as well as respect subordinates. They are also obliged to “report criminal activity, corruption and misconduct to the appropriate authority”.

In relation to the laws of armed conflict, among other rules, it is prohibited to obey “an obviously illegal order”, attack civilians and civilian objects, kill, torture or abuse prisoners of war, and tolerate or engage in rape or looting.

⁴⁰⁶ *Ibid.*

⁴⁰⁷ *Ibid.*

⁴⁰⁸ *Ibid.*

⁴⁰⁹ Available at http://www.dcc.mil.za/Code_of_Conduct/Files/English.htm.

In both the CF and the SANDF Codes of Conduct, respect for civilians is emphasised, a concept which should govern all peacekeeping personnel and stop them from behaviour such as sexual exploitation. This requirement is found in the regulations covering humane treatment for civilians, prohibition of attacking civilians, and prohibition of abuse, torture and rape.

Comparing these three very different codes of conduct reveals that the SANDF Code of Conduct is by far the most detailed and comprehensive, in that it covers behaviour related to the law of armed conflict, but also social and criminal behaviour. Particularly relevant to preventing violence against women are the rules prohibiting abuse of authority or position, requiring people to be treated fairly, and for rights and dignity of all people to be respected. There is a direct prohibition of rape, and personnel are obliged to report criminal activity and misconduct. All these regulations in the Code of Conduct assist in directing behaviour away from patronising of prostitutes, sexual abuse and exploitation, trafficking and sexual slavery, as well as discouraging impunity for such behaviour.

2.4.5.2. United Nations Codes of Conduct

As well as following their own national code of conduct, if one exists, peacekeeping personnel are required to follow the codes of conduct issued by the UN. There are multiple codes of conduct, applying to different personnel on the mission. A PSO, such as MONUC,⁴¹⁰ may even provide its own separate code of conduct.

The best-known of the UN codes of conduct is the Ten Rules Code of Personal Conduct for Blue Helmets.⁴¹¹ This code applies to military and CivPol personnel in a PSO. It is given to peacekeeping personnel on a card, along with the further details in the document 'We Are United Nations Peacekeepers', which promotes professional and disciplined behaviour that respects local

⁴¹⁰ Mission des Nations Unies en République Démocratique du Congo (United Nations Mission in the Democratic Republic of Congo), code available at <http://www.monuc.org/news.aspx?newsID=858>.

⁴¹¹ *Supra* note 128. See also Department of Peacekeeping Operations, UNCIVPOL Code of Conduct, available at http://web.schq.mi.th/~matpmunny/UN%20document/CIVPOL/selstand_civpol/annexe.pdf.

inhabitants and customs, and never brings discredit to the UN through improper personal conduct or abuse of position.⁴¹²

The Ten Rules require behaviour that includes:⁴¹³

1. Dress, think, talk, act and behave in a manner befitting the dignity of a disciplined, caring, considerate, mature, respected and trusted soldier, displaying the highest integrity and impartiality. Have pride in your position as a peace-keeper and *do not abuse or misuse your authority*.

3. Treat the inhabitants of the host country with respect, courtesy and consideration. You are there as a guest to help them and in so doing will be welcomed with admiration. *Neither solicit nor accept any material reward, honor or gift*.

Both of these rules have relevance to behaviour that constitutes violence against women. However, the most direct rule actually explicitly states:

“4. Do not indulge in immoral acts of sexual, physical or psychological abuse or exploitation of the local population or United Nations staff, especially women and children.”

The combination of these three rules, with particular emphasis on Rule Four, which explicitly prohibits sexual abuse and exploitation, should make it clear to military and CivPol personnel engaged in PSOs that this behaviour is not permitted by ‘Blue Helmets’ during peacekeeping missions.

The MONUC Code of Conduct is specifically related to the issue of sexual exploitation and abuse. It is actually titled Code of Conduct on Sexual Exploitation and Sexual Abuse.⁴¹⁴ This has stemmed from that fact that the mission in the Democratic Republic of Congo (DRC) is in fact one of the missions where the most allegations of sexual abuse and exploitation have arisen, and continue to arise.⁴¹⁵

⁴¹² Department of Peacekeeping Operations, “We Are United Nations Peacekeepers”, A/61/645, Annex III. See Appendix 1.

⁴¹³ Emphasis added. For the full Ten Rules Code of Conduct for Blue Helmets and “We Are United Nations Peacekeepers”, see Appendix 1.

⁴¹⁴ Available at

<http://monuc.unmissions.org/LinkClick.aspx?fileticket=G58IEd8POw4%3d&tabid=2587&mid=3051>.

⁴¹⁵ Secretary-General Press Release, ‘Secretary-General ‘Absolutely Outraged’ by Gross Misconduct by Peacekeeping Personnel in Democratic Republic of Congo’, 19 November 2004, SG/SM/9605, AFR/1069, PSO/115; see Statistics on the Conduct and Discipline Unit (CDU) website <http://cdu.unlb.org/>.

The MONUC website explains the issues, details the Code of Conduct, and details where and how to report misconduct.⁴¹⁶ The Code of Conduct strictly prohibits MONUC personnel engaging in:

- Any act of sexual abuse and exploitation, or any other form of sexually humiliating, degrading or exploitative behavior.
- Any type of sexual activity with children (persons under the age of 18 years).
- Use of children or adults to procure sexual services for others.
- Exchange of money, employment, goods, services for sex with prostitutes or others.
- Any sexual favour in exchange of assistance provided to the beneficiaries of such assistance.
- Visits to brothels or places which are declared off-limits.

This is a code of conduct that should be adopted in all PSOs, regardless of whether or not there is a history of allegations of sexual abuse and exploitation. It is clear and concise about what behaviour is prohibited. It covers sexual abuse and sexual exploitation, as well as procuring and patronising of prostitutes, and has an emphasis on prohibiting sexual activity with children. What it is missing is specific reference to trafficking and sexual slavery. While these are effectively covered by the first regulation prohibiting “[a]ny act of sexual abuse and exploitation, or any other form of sexually humiliating, degrading or exploitative behaviour”, it would also be useful to explicitly prohibit trafficking and sexual slavery, as well as any behaviour that facilitates trafficking and sexual slavery.

‘We Are United Nations Peacekeeping Personnel’⁴¹⁷ is similar to a code of conduct for personnel, with an extensive list of behavioural mores to follow, a number of which specifically reference sexual exploitation. Personnel declare that they will, among other behaviour, always conduct themselves in a professional and disciplined manner; comply with the provisions of the mission mandate; respect local laws, customs and practices and be aware of and respect culture, religion, traditions and gender issues; support and aid the infirm, sick and weak; obey UN supervisors/superiors; report all acts involving sexual exploitation and abuse. In addition, personnel promise to never commit improper

⁴¹⁶ See the MONUC website, Conduct and Discipline <http://monuc.unmissions.org/Default.aspx?tabid=2582>.

⁴¹⁷ *Supra* note 412.

personal conduct; fail to perform duties or abuse positions; commit any act that could result in physical, sexual or psychological harm or suffering to members of the local population, especially women and children; commit any act involving sexual exploitation and abuse, sexual activity with children under 18, or exchange of money, employment, goods or services for sex; or become involved in sexual liaisons which could affect the mission's impartiality.

2.4.5.3. Are Codes of Conduct Effective as a Preventative Measure?

2.4.5.3.1. National Codes of Conduct

From the codes of conduct examined here, it is evident that national codes of conduct cannot be relied upon as regulations to effectively prevent violence against women. The first reason is that not all defence forces have codes of conduct. The second is that not all codes of conduct cover the same conduct. As is demonstrated by the codes of conduct examined above, not all codes of conduct prohibit the type of behaviour that constitutes violence against women. Some do not even regulate behaviour according to the law of armed conflict, and so are lacking in any real substance. Thus, even though military personnel may prioritise following their national code of conduct over the UN Code of Conduct, that national code of conduct may not be comprehensive, and may have no prohibition of behaviour constituting violence against women such as sexual abuse and exploitation.

Even if national codes of conduct do contain regulations that prohibit violence against women, a code of conduct is not enforceable without criminal law provisions. A code of conduct is not a piece of law, and thus in itself cannot be enforced and punishment cannot be applied from the code itself. Enforcement of code regulations and punishment of violations can only be undertaken through legislative provisions that specifically address either all violations of the code of conduct in general, or specific crimes that are also mentioned in regulations of the code of conduct. Thus a code of conduct may be something that military personnel apply as a matter of principle, but without legislative disciplinary mechanisms relating to the code's regulations, a code of conduct is ultimately not a truly effective method of preventing and punishing violence against women.

2.4.5.3.2. *United Nations Codes of Conduct*

The UN Codes of Conduct specifically prohibit sexual abuse and exploitation; however, sexual abuse and exploitation have been and continue to be committed by peacekeepers.⁴¹⁸ This demonstrates that a code of conduct is not enough as a measure to prevent this behaviour being committed.

While military and CivPol peacekeeping personnel are obliged to carry the card of the Ten Rules with them, not all personnel prioritise the Rules. Some see their priority as being to follow their national code of conduct, if one exists.⁴¹⁹ Another problem is adequate training on the Code of Conduct and the 'zero tolerance policy'. The DPKO does have special training modules on sexual exploitation and sexual abuse. However, one of the biggest problems with training within PSOs is that there is so much to be conducted and not all mission personnel end up being trained in all necessary areas. There are constant troop rotations (sometimes as frequently as every 3 or 6 months), which creates a constant need for training of new arrivals, as well as ensuring existing personnel are up to date. Many personnel find the sheer amount of training involved upon arrival at a mission to be overwhelming.⁴²⁰ New recruits tend to prioritise remembering only what they see as the most important elements- usually aspects related to military activity, and not gender or sex issues, and the Ten Rules become just another card in their pocket.⁴²¹

It is also problematic that the Ten Rules do not apply to all personnel. Standards of conduct should be applicable to all personnel in a mission, regardless of category of personnel, in order to create a uniform standard of conduct practised throughout the whole mission. The importance of such a problem has been recognised by the UN, which mandated a Group of Legal Experts to address the issue of "standardising the norms of conduct so that they are applicable to all categories of

⁴¹⁸ See Statistics on the CDU website <http://cdu.unlb.org/>.

⁴¹⁹ Higate, 'Case Studies: DRC & Sierra Leone', *supra* note 120, p. 50.

⁴²⁰ *Ibid.*, p. 19.

⁴²¹ *Ibid.*

peacekeeping personnel". The subsequent report of the Group of Legal Experts is discussed *infra* in Chapter 3.⁴²²

Thus it is apparent that codes of conduct are not adequate preventative measures. As stated above, violations of national codes of conduct are only enforceable through criminal law, and violations of UN codes are only enforceable by repatriation and subsequently prosecution through national military or civil criminal law. Thus, violations of the UN codes of conduct are not subject to disciplinary action without the reinforcement of national criminal law anyway.

2.4.6. Alternative Forms of Regulation- UN Regulations

Since the UN became aware of the issue of sexual exploitation and abuse by peacekeepers, the organisation has made developments towards finding a solution for the problems. Unfortunately, the commission of sexual exploitation and abuse, and use of prostitutes by peacekeeping personnel is still on-going.⁴²³ The two biggest problems lie with the inability of the UN firstly to investigate and prove cases, and secondly, to discipline peacekeeping personnel. These are the two principle issues identified in UN reports on the issue of accountability of peacekeepers for sexual exploitation and abuse by peacekeeping personnel. Since late 2003, the UN has begun to take action towards overhauling its regulations and agreements in order to ensure accountability for peacekeeping personnel for criminal actions, in particular sexual exploitation and abuse. Such actions will be analysed in detail in Chapter 3.

⁴²² Report of the group of legal experts on making the standards contained in the Secretary-General's Bulletin binding on contingent members and standardising the norms of conduct so that they are applicable to all categories of peacekeeping personnel, A/61/645, 18 December 2006. *See* Chapter 3.

⁴²³ *See e.g.*, BBC report on exploitation in Haiti by UN peacekeepers, *supra* note 310; Statistics on the CDU website <http://cdu.unlb.org/>; Secretary-General's Reports of sexual exploitation and abuse investigation data, A/58/777 for 2003; A/59/782 for 2004; A/60/861 for 2005; A/61/957 for 2006; A/62/890 for 2007; A/63/720 for 2008.

2.5. Conclusion

Criminalising violence against women encourages a social policy that allows women to regain their autonomy that is lost when they are the victims of violent conduct. With regards to preventing prostitution and sexual exploitation, criminalisation allows women to regain autonomy in relation to their health, sexuality, family and marriage life, economic circumstances, development, and education. Criminalisation of this anti-social behaviour enables women “to have an adequate range of choices”, and puts in place “laws which protect [these women] from the consequences of their own vulnerability and of communal living”.⁴²⁴ “The criminal law inevitably reflects the way in which politically organised society protects and reconciles the interests valued in a given society.”⁴²⁵ The state has basic responsibilities to the community, “such as ensuring that people co-operate with each other so as to promote non-exploitative social and economic relations”.⁴²⁶

In the first step to determining whether particular conduct should be criminalised, it must be established that the conduct results in harm to an identifiable victim. This chapter has demonstrated that the commission of gender-based violence against women such as sexual exploitation and patronising of prostitutes by peacekeepers is harmful. It violates many rights of the women involved. In circumstances involving the transmission of STIs and HIV/AIDS, it also results in harm to the peacekeepers themselves, which adjoins a paternalist justification for criminalisation. The harm caused justifies the restriction on individual liberties that criminalisation results in.

However, it not only the harm resulting from the conduct that justifies criminalisation- it must also be ascertained if any other form of non-criminal law regulation may prevent the harmful conduct. This chapter has examined the potential of codes of conduct in this regard. As a form of regulation other than criminal law, codes of conduct, whether issued by national militaries or the UN, are insufficient to prevent peacekeepers from committing gender-based crimes, and unable to ensure accountability for such misconduct.

⁴²⁴ Wilson, *supra* note 141.

⁴²⁵ *Ibid.*

⁴²⁶ *Ibid.*, p. 41.

The following chapter will continue the examination of alternative forms of international regulation. It will demonstrate why and how the UN reports, regulations and agreements alone are insufficient to prevent criminal misconduct by peacekeepers, but instead support national criminalisation specifically targeted at jurisdiction over peacekeepers as well as coordinating regulations to ensure such criminal accountability can be effectively enforced. The UN actions assist in the practical application of criminal law to gender-based violence against women.

3. United Nations Steps towards Accountability of Peacekeeping Personnel

3.1. Introduction

Chapter 2 has demonstrated the extent of the problems of sexual exploitation and abuse (SEA) by peacekeeping personnel. As a consequence of increased awareness of the issue of sexual exploitation and abuse by peacekeeping personnel, the United Nations (UN) has made developments towards finding a solution for the problem. For the purposes of this thesis, an examination of the actions taken by the UN must be undertaken to determine whether or not the UN actions are effective in both preventing and punishing SEA by peacekeeping personnel. Actions taken by different UN entities are examined- the Secretariat, the member states (in the guise of bodies such as the General Assembly), and various departments and agencies such as the Department of Peacekeeping Operations (DPKO). There is a need for the UN to be involved in the prevention and punishment of SEA by UN peacekeepers, as the peacekeepers are acting under the auspices of the UN. Consequently, it is the UN, in the form of the Security Council, which issues the mandate of the peace support operations (PSOs); and the Secretariat and associated departments such as the DPKO, which coordinate and administer PSOs. Thus, even though it is ultimately the responsibility of the sending states to discipline their troops, the application of standard regulations to all personnel is necessary for the effective functioning of a mission. A uniform standard of conduct is indispensable to a productive PSO.

The main actions taken by the UN have occurred since late 2003, with a significant number taking place from 2005 onwards. These include issuances of regulations, reports with recommendations, draft documents including a Draft Convention, and General Assembly resolutions. The emphasis of these is specifically on the issue of sexual exploitation and abuse, but some relate to misconduct and discipline in general. The real catalyst for organisational change within the UN in relation to the issue of SEA in peace support operations (PSOs) was the report entitled *A comprehensive strategy to*

eliminate future sexual exploitation and abuse in United Nations peacekeeping operations, known as the Zeid Report.⁴²⁷ The report was released in March 2005, and is highly critical of the system, analysing the problems and recommending solutions. The Report examined the rules on standards of conduct; the UN investigatory process; organisational, managerial and command accountability; and individual disciplinary, financial and criminal accountability. There are several principal areas in which the Zeid Report and subsequent reports have found problems, and the organisational changes have sought to address these. These areas are: the prohibition of SEA in UN missions; the creation of agreements with states and conventions to obligate states to ensure criminal accountability by exercising jurisdiction over criminal offences committed by peacekeeping personnel; lack of cooperation between the UN and states in misconduct investigations; inadequate recording and reporting of misconduct cases and data; ensuring managerial and command responsibility; the need for attention to victims' rights including financial compensation, care and assistance; the need for more comprehensive training both pre- and post-deployment; and the need for adequate welfare and recreation facilities for personnel in the field.⁴²⁸ These issues will be discussed in this chapter as they relate to the following themes: prohibition and prevention of sexual exploitation and abuse; jurisdiction; immunity; accountability (individual and superior/command); cooperation or mutual legal assistance; and victims' rights.

The UN has also established a Conduct and Discipline Unit (CDU) within the Department of Field Support (DFS), a department that functions in conjunction with the Department of Peacekeeping Operations (DPKO). The CDU consists of a main office located at UN Headquarters in the USA, and in-mission units.⁴²⁹ The main role of the CDU is to develop and implement policies and strategies to

⁴²⁷ The Zeid Report is a report by His Royal Highness Prince Zeid Ra'ad Zeid Al-Hussein, who was commissioned by the Secretary-General in 2004 to advise and assist in addressing the problem of sexual exploitation and abuse by UN peacekeeping personnel. *A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations*, (report accompanying Letter dated 24 March 2005 from the Secretary-General to the President of the General Assembly), A/59/710, March 2005.

⁴²⁸ *Ibid.*

⁴²⁹ The author thanks the CDU for assistance on the work of the CDU. Except where otherwise cited, all references to the work of the CDU are courtesy of an interview with a senior member of the CDU held at UN Headquarters in New York in March 2008.

prevent sexual exploitation and abuse. This is carried out through the enforcement of standards of conduct; increasing awareness of conduct and discipline issues; training mission personnel and host populations; acting as a focal point for allegations of misconduct (including SEA); advising heads of mission on all conduct and discipline issues and implementation of measures to prevent misconduct; monitoring allegations of misconduct; providing feedback to victims and host populations on investigation outcomes; and collection of data on investigations.⁴³⁰ Due to the establishment of the CDU, the DPKO/DFS is the most advanced UN agency in terms of actions taken with regard to conduct and discipline issues. The DPKO devotes a large amount of resources to conduct and discipline, something which other agencies are currently unable to do.⁴³¹

In addition to the CDU, an inter-agency task force has been established to deal with some of the issues listed above.⁴³² This UN and non-governmental organisation (NGO) task force on protection from SEA (the SEA Task Force) includes UN agencies such as the DPKO the DFS, the Office for the Coordination of Humanitarian Affairs (OCHA), UN Development Programme (UNDP), the CDU, UN High Commissioner for Refugees (UNHCR), and UNICEF. Participating NGOs include Save the Children UK, Human Rights Watch, Oxfam and Refugees International.⁴³³ The SEA Task Force works to prevent and ensure accountability for sexual exploitation and abuse in four main areas of engagement with and support of local populations; prevention; response systems including victim assistance; and management and coordination.⁴³⁴

This chapter summarises and analyses the actions that have been taken by the UN in relation to the thematic areas listed above, with emphasis on the prohibition and prevention of sexual exploitation

⁴³⁰ See the Conduct and Discipline Unit website <http://cdu.unlb.org/>. See also Special measures for protection from sexual exploitation and sexual abuse, Report of the Secretary-General, A/61/957, 15 June 2007, paras. 22-26.

⁴³¹ Interview with Ariana Pearlroth, gender and SEA focal point of the Office for the Coordination of Humanitarian Affairs (OCHA), March 2008.

⁴³² Hereinafter 'SEA Task Force' (SEA meaning sexual exploitation and abuse). See A/61/957, paras. 19 and 20.

⁴³³ The author thanks Marianne Mollman of Human Rights Watch and Ariana Pearlroth of OCHA for the information about this task force. See also Special measures for protection from sexual exploitation, Report of the Secretary-General, 25 June 2008, A/62/890, paras. 18-19.

⁴³⁴ Special measures for protection from sexual exploitation and sexual abuse, Report of the Secretary-General, A/63/720, 17 February 2009, para. 17.

and abuse in UN missions, jurisdiction, and criminal accountability of peacekeeping personnel. Mention will be made of the work of the CDU and the SEA Task Force, and various UN documents including resolutions; with an emphasis on the Draft Convention.

3.2. *The prohibition and prevention of sexual exploitation and abuse in UN missions*

While prosecution of perpetrators of sexual exploitation and abuse is vital, the first step, and even more importantly, is to ensure SEA does not happen in the first place. To achieve this, the UN has been working on a strengthened system of prohibition and prevention of SEA (and misconduct in general) by its personnel. This has consisted of the implementation of a Secretary-General's Bulletin on the prohibition of SEA, the establishment of the CDU, the revision of the Draft Model Memorandum of Understanding (MoU), addressing inadequate recording and reporting of misconduct case and data, enacting more comprehensive training both pre- and post-deployment, and looking towards ensuring adequate welfare and recreation facilities in the field. These are all actions the UN itself has taken as an international organisation at Secretariat and agency level, although the implementation of some of the changes (e.g. the adoption of new articles in subsequently adopted Memoranda of Understanding) does require the cooperation of states. This section will examine each of these instruments and areas of action.

3.2.1. Secretary-General's Bulletin

The first institution-wide step taken by the UN to prohibit SEA by peacekeeping personnel was the Secretary-General's bulletin of 2003 entitled 'Special measures for protection from sexual exploitation and sexual abuse'.⁴³⁵ This is still the principal source of authority for the UN when it comes to addressing the prohibition and prevention of sexual exploitation and abuse; almost all other documents issued refer to this bulletin. It is an internal UN document, and therefore constitutes administrative prohibition of SEA. The bulletin is brief, and succinctly clarifies the prohibition of the commission of acts of sexual exploitation and sexual abuse by UN forces

⁴³⁵ ST/SGB/2003/13, 9 October 2003.

conducting operations under UN command and control.⁴³⁶ The bulletin applies to all staff of the UN, including staff of separately administered organs and programmes of the UN.⁴³⁷ The meanings of sexual exploitation and sexual abuse are defined in the bulletin, the definitions of which are used in this thesis. These have become the accepted definitions for use by the UN, and there is no other agreed definition within international criminal law for sexual exploitation.⁴³⁸

“[T]he term ‘sexual exploitation’ means any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another. Similarly, the term ‘sexual abuse’ means the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions.”⁴³⁹

Section 3 of the Secretary-General’s Bulletin details the prohibition of sexual exploitation and sexual abuse. While it is recognised that such behaviour has always been unacceptable and prohibited conduct for UN staff, the bulletin gives more detailed clarification of existing general obligations under the UN Staff Rules and Regulations.⁴⁴⁰ The Bulletin prohibits sexual exploitation, sexual conduct with a minor, prostitution-related activities, and relationships based on unequal power dynamics:

“3.2 ...

(a) Sexual exploitation and sexual abuse constitute acts of serious misconduct and are therefore grounds for disciplinary measures, including summary dismissal;

(b) Sexual activity with children (persons under the age of 18) is prohibited regardless of the age of majority or age of consent locally. Mistaken belief in the age of a child is not a defence;

(c) Exchange of money, employment, goods or services for sex, including sexual favours or other forms of humiliating, degrading or exploitative behaviour, is prohibited. This includes any exchange of assistance that is due to beneficiaries of assistance;

⁴³⁶ Section 2.2.

⁴³⁷ Section 2.1.

⁴³⁸ For a discussion of the definition of ‘sexual violence’ as found in international criminal law, particularly the Rome Statute, *see* Chapter 5.

⁴³⁹ Section 1.

⁴⁴⁰ Staff Rules and Regulations, ST/SGB/2007/4.

(d) Sexual relationships between United Nations staff and beneficiaries of assistance, since they are based on inherently unequal power dynamics, undermine the credibility and integrity of the work of the United Nations and are strongly discouraged...”

Section 3 obliges any staff member to report any concerns or suspicions regarding sexual exploitation or abuse, and to create and maintain an environment that prevents SEA, with particular emphasis on the responsibility of managers.⁴⁴¹ It is also explicitly stated that:

“3.3 The standards set out above are not intended to be an exhaustive list. Other types of sexually exploitive or sexually abusive behaviour may be grounds for administrative action or disciplinary measures, including summary dismissal, pursuant to the United Nations Staff Regulations and Rules.”

Section 4 of the bulletin specifies the duties of heads of departments, offices and missions, obliging them to create and maintain an environment that prevents sexual exploitation and abuse, ensure circulation of the bulletin, take appropriate disciplinary action in cases of misconduct, appoint a focal point for sexual exploitation and abuse reports, and to inform the UN of any investigations and actions taken.

Finally, the bulletin makes reference to criminal prosecution: “If, after proper investigation, there is evidence to support allegations of sexual exploitation or sexual abuse, these cases may, upon consultation with the Office of Legal Affairs, be referred to national authorities for criminal prosecution.”⁴⁴² This indicates that the UN envisages criminal prosecution as a valid and necessary result of cases of sexual exploitation and abuse. Yet it is also recognition of the limited reach of the UN in this regard. While the UN can be significantly involved in the prohibition and prevention of SEA, as an international organisation and not a state entity, the UN has little authority with regards to accountability. The UN can take disciplinary action in an administrative form, such as repatriation, but does not have the legal capacity to engage in criminal prosecution. These issues of jurisdiction and accountability will be addressed *infra*.

⁴⁴¹ Sub-sections 3.2 (e) & (f).

⁴⁴² Section 5.

3.2.2. Revised Draft Model Memorandum of Understanding

A Memorandum of Understanding (MoU) is an instrument concluded between states or states and organisations. MoUs are not treaties, and are generally seen as not legally binding.⁴⁴³ MoUs are chosen as a form of agreement as they do not require the formalities of a treaty, are amended without difficulty, and can be more easily terminated.⁴⁴⁴ The most common use of MoUs is to form an agreement concerning the status of armed forces in the territory of another state.⁴⁴⁵

With regards to UN PSOs, an MoU is an agreement between the UN and troop contributing countries (TCCs) detailing the obligations and rights in the form of administrative, logistics and financial terms and conditions of both parties to the agreement in relation to the personnel, equipment and services contributed to an operation.⁴⁴⁶ The Model Memorandum of Understanding (Model MoU) has the basic provisions which are applied and also individualised where relevant for each mission. In 2007, revised provisions to the Model MoU were adopted in order to incorporate obligations relating to the prevention and punishment of sexual exploitation and abuse.⁴⁴⁷ Five new provisions have been adopted, along with a new Annex H, and additional definitions in Annex F. New definitions added to the MoU include the definitions of sexual exploitation and sexual abuse that are found in the Secretary-General's Bulletin.⁴⁴⁸ Others include:

Misconduct means any act or omission that is a violation of United Nations standards of conduct, mission-specific rules and regulations or the obligations towards national and local laws and

⁴⁴³ A. Aust, *Modern Treaty Law and Practice*, 2nd ed., (Cambridge University Press, Cambridge 2007), Chapter 3 MOUs, pp. 32-57. *See also* A. Aust, 'The Theory and Practice of Informal International Instruments' (1986) 35 *International and Comparative Law Quarterly* 787-812; K. Raustiala, 'Form and Substance in International Agreements' (2005) 99 (3) *The American Journal of International Law* 581-614; J.H. McNeill, 'International Agreements: Recent U.S.-UK Practice Concerning the Memorandum of Understanding' (1994) 88 *American Journal of International Law* 821-826.

⁴⁴⁴ Aust, *Modern Treaty Law and Practice*, *ibid.*, pp. 45-46.

⁴⁴⁵ *Ibid.*, p. 48; McNeill, *supra* note 443.

⁴⁴⁶ Such an instrument is not exclusive to the UN, *see e.g.* Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces, 19 June 1951, 199 UNTS 67.

⁴⁴⁷ The Model MoU can be found in A/C.5/60/26, Chapter 9, p. 148. The initial revised draft model MoU was part of the Report of the Group of Legal Experts on ensuring accountability of United Nations staff and experts on mission with respect to criminal acts committed in peacekeeping operations, A/60/980, 16 August 2006 (hereinafter 'Report on ensuring accountability'); and the final revised draft model MoU is in the Report of the Special Committee on Peacekeeping Operations and its Working Group on the 2007 resumed session, A/61/19 (Part III), Annex, 12 June 2007. The later draft was adopted by A/RES/61/291, 24 August 2007.

⁴⁴⁸ *Supra* Secretary-General's Bulletin.

regulations in accordance with the status-of-forces agreement where the impact is outside the national contingent.

Mission-specific rules and regulations means, mindful of national caveats, standard operating procedures, directives and other regulations, orders and instructions issued by the Head of Mission, Force Commander or Chief Administrative Officer of the United Nations peacekeeping mission in accordance with the United Nations standards of conduct; they shall contain information on applicable national and local laws and regulations.

Serious misconduct is misconduct, including criminal acts, that results in, or is likely to result in, serious loss, damage or injury to an individual or to a mission. Sexual exploitation and abuse constitute serious misconduct.

These definitions will help create understanding as to the standards of conduct to be engaged in by mission personnel, and assist states, the Office of Internal Oversight (OIOS) and the CDU with the adoption of policies and regulations relating to conduct and discipline of all personnel.

Article 3 of the Model MoU has been amended to include as one of the purposes of the MoU the specification of UN standards of conduct for personnel provided by the state party to the agreement. Two of the five new provisions will be discussed in this section. Article 7 quater Investigations will be dealt with *infra* in the section on Lack of cooperation between the UN and states in misconduct investigations, Article 7 quinquies Exercise of jurisdiction by the Government will be discussed in the section on Jurisdiction, and Article 7 sexiens Accountability is discussed in several different sections as it deals with a variety of issues such as command responsibility, and paternity claims. Changes to the UN code of conduct, We Are United Nations Peacekeeping Personnel, under Annex H, have been discussed in Chapter 2. The emphasis in the new MoU provisions is on the responsibilities of the sending state as regards ensuring the discipline and good order of national contingent members, the responsibilities of the national contingent commander in maintaining discipline and good order, cooperation of investigations, sending state jurisdiction, and accountability. However, there are some elements that deal with prohibition and prevention within the UN.

Article 7 bis requires a sending state to ensure that all contingent members are obligated to comply with the UN standards of conduct (the new Annex H). It is the obligation of the government to assure

that all contingent members are familiar with and fully understand these standards of conduct, and hence to conduct adequate and effective pre-deployment training of personnel. The UN also agrees to provide mission-specific training on standards of conducts, mission-specific rules and regulations, and relevant local laws and regulations, conducted during mission assignment. Under Article 7 ter, which deals with discipline, the sending state is obliged to train the national commander pre-deployment to enable the national commander to fully discharge his or her responsibilities in maintaining discipline and good order. The UN is also required to organise training on UN standards of conduct, mission rules and regulations, and the local laws and regulations for commanders upon their arrival in-mission.

In these provisions, we see an interdependent agreement, with each party to the MoU agreeing to undertake certain obligations to guarantee a comprehensive implementation of the standards of conduct. This recognises that full implementation of these standards is not possible without action and cooperation of both the UN and member states. While, as it will be shown *infra*, criminal accountability is the responsibility and domain of states, the UN must be the principal actor with regards to ensuring all personnel are aware of the prohibition of misconduct such as SEA. Training must be conducted by both the sending state and the UN to make certain that personnel are aware not just of the prohibition of SEA itself, but the importance of not engaging in such behaviour, in that they learn the impact of SEA on the victims, the community, the mission, and the UN. Personnel must also be aware of the consequences of misconduct such as SEA. The aim of this is to prevent SEA occurring in the first place, avoiding the need for punitive measures to be enacted.

3.2.3. Conduct and Discipline Units

Following up on this need for prevention of SEA within the UN, the establishment of the CDU and the SEA Task Force constitute substantial advancements by the UN towards “institutionalizing comprehensive, United Nations-wide implementation of prevention of abuse and the enforcement of the standards of conduct and strategic collaboration with non-governmental organization

partners”.⁴⁴⁹ The CDU was established to develop, interpret and implement strategies and measures to prevent and address misconduct and discipline issues, and to strengthen the capacity of the UN to address misconduct in a more consistent manner. For example, the CDU has developed internal guidelines on how to handle allegations, training guidelines on SEA, and reporting mechanisms for the field and headquarters.⁴⁵⁰

Mission CDUs are the units of a mission which adopt policy directives, standard operating procedures, and manuals and guidelines, as well as regulate and streamline important issues and activities concerning conduct and discipline within the mission.⁴⁵¹ The CDU also adopts other operational material on the basis of actual practice in the field or at Headquarters, such as maintenance of misconduct data, assessment missions, and guidance.⁴⁵² The UN has found that new guidelines and standard operating procedures are still needed to address policies that have been recently adopted, as well as changes in the facets of implementation of some existing processes.⁴⁵³ For example, it is the aim of the CDU to issue guidelines on the interpretation of the Secretary-General’s bulletin. This is due to the complexity of issues covered in the bulletin, and guidelines will be issued in order to review, elaborate and clarify the obligations of mission personnel under the bulletin.⁴⁵⁴

The CDU also engages on the issue of criminal accountability with the Office of Legal Affairs (OLA), which is coordinating with the Sixth Committee (Legal) of the General Assembly on issues of criminal accountability (such as the progress of the Draft Convention). Any decision to refer a case to national authorities for a criminal investigation is taken in consultation with the OLA.⁴⁵⁵

⁴⁴⁹ Special measures for protection from sexual exploitation and sexual abuse, Report of the Secretary-General, A/61/957, 15 June 2007, para. 32.

⁴⁵⁰ A/62/890, paras. 21-2.

⁴⁵¹ Report of the Secretary-General, Comprehensive report of conduct and discipline including full justification of all posts, A/62/758, 20 March 2008, para. 48. (Hereinafter ‘Comprehensive report of conduct and discipline’.) There were 18 field CDUs in 2008; A/63/720, para. 21.

⁴⁵² Comprehensive report of conduct and discipline, *ibid.*, para. 48.

⁴⁵³ *Ibid.*, para. 49.

⁴⁵⁴ *Ibid.*, paras. 5 and 6.

⁴⁵⁵ *Ibid.*, para. 14.

The CDU further assists with the reporting requirements of the Secretariat in relation to conduct and discipline issues, maintaining oversight of the problems and reporting on any issues.⁴⁵⁶

More detail is provided on the role of the CDU under each of the categories discussed below in this chapter.

3.2.4. In-mission Preventative Measures

Within missions, with the assistance of the mission CDUs, heads of mission have put in place preventative measures in order to protect local communities and avoid further instances of SEA. Mission specific measures and instructions are issued by the head of mission, force commander or police commissioner, as appropriate, to ensure adherence to standards of conduct. Some of the most common measures are “restriction of movement of personnel in out-of-bounds areas and after certain hours, the wearing of uniforms on and off duty, and regulated and supervised recreation activities for uniformed personnel”.⁴⁵⁷ On top of the UN Code of Conduct, mission-specific codes of conduct have been adopted and posted in all mission locations, requiring the signature of all civilian staff, MilObs, CivPol, and any consultants and contractor personnel.⁴⁵⁸ The need for distinct mission-specific codes of conduct stems from the fact that every mission exists in its own unique environment. This means not only a different mission mandate, but a different local community and government, different law and order conditions, and different nationalities of mission personnel. Hence it is necessary, on top of the UN-wide standards of conduct, to enact mission-specific codes of conduct specific to the mission circumstances and location, in order to take into account these individualities.

This difference also applies to the CDU structure. A network of in-mission SEA focal points has been developed by CDUs in some missions, and in others CDU officers have been posted in various areas of the mission. This disparity takes into account the set-up of the mission: some missions may have

⁴⁵⁶ *Ibid.*, para. 50.

⁴⁵⁷ *Ibid.*, para. 41.

⁴⁵⁸ *Ibid.* For detail on training, *see infra* The need for more comprehensive training both pre- and post-deployment.

one central location or be located in a small region, such as the UN Peacekeeping Force in Cyprus (UNFICYP),⁴⁵⁹ and others, such as the Mission des Nations Unies en République Démocratique du Congo (MONUC), are spread out amongst a large number of posts throughout a large territorial area, with considerable distance between stations.⁴⁶⁰ It is necessary to ensure personnel at all mission stations are engaged with CDU personnel and CDU policies and regulations, and this may require CDU structural differences between missions.

3.2.5. The need for more comprehensive training both pre- and post-deployment

As is evident from the new MoU provisions and the functions of the CDU, training is a particularly important part of the prevention of SEA, as without explicit knowledge of what behaviour is not permitted peacekeeping personnel may be unaware of their obligations. Training is especially vital given the frequent rotation of peacekeeping personnel.⁴⁶¹ It is the responsibility of the mission CDUs to raise awareness of standards of conduct in peacekeeping missions, and it is the Chiefs of the CDUs who must ensure full implementation of comprehensive training strategies.⁴⁶² This includes training peacekeeping personnel and raising awareness amongst the local population. Training personnel distinguishes between managers and commanders and the various categories of subordinate personnel deployed in the mission, based on the different tasks of the personnel within the mission.⁴⁶³ With respect to outreach activities with the local population, the CDU targets community leaders, local governmental and non-governmental organisations, and media.⁴⁶⁴

The CDU has developed training and awareness-raising material for orientation sessions on SEA, including the CDU website⁴⁶⁵ and generic training modules. A website can be an extremely valuable

⁴⁵⁹ See <http://www.un.org/Depts/Cartographic/map/dpko/unficyc.pdf>.

⁴⁶⁰ See <http://www.un.org/Depts/Cartographic/map/dpko/monuc.pdf>.

⁴⁶¹ Report of the Secretary-General, Criminal accountability of United Nations officials and experts on mission, 11 August 2008, A/63/260, para. 74 (Hereinafter ‘SG’s 2008 Report on Criminal accountability’).

⁴⁶² Comprehensive report of conduct and discipline, *supra* note 451, para. 67.

⁴⁶³ SG’s 2008 Report on Criminal accountability, *supra* note 461, para. 75. For further discussion on managerial/superior and command responsibilities, see *infra* Ensuring managerial/superior and command responsibility.

⁴⁶⁴ Comprehensive report of conduct and discipline, *supra* note 451, paras. 35 and 40.

⁴⁶⁵ <http://cdu.unlb.org/>.

tool for training and awareness-raising if consistently updated. The website was not regularly updated, between early 2007 and late 2009. Without this maintenance a website becomes an outdated source that may be of little use. It would be of benefit to the CDU to maintain the website as a source for all relevant documents, as well as information about the CDU itself (e.g. new campaigns, reports, etc).

Training is conducted by CDU staff, Integrated Training Teams and focal points, as well as by commanders in military or formed police units.⁴⁶⁶ In order to enable training to be conducted by military and police commanders, the CDU engages in ‘train-the-trainer’ workshops.⁴⁶⁷ Headquarters CDU has developed standard modules on prevention of SEA, designed for all levels and categories of peacekeeping personnel. UNDP, the DPKO, UNICEF and OCHA have created a training video entitled ‘To Serve with Pride: Zero Tolerance for Sexual Exploitation and Abuse’.⁴⁶⁸ In addition, it is the responsibility of each field CDU to develop and implement mission-specific training strategies as well as evaluations to measure the impact of such training.⁴⁶⁹ Mission-specific training takes into account local issues in the host country in order to ensure personnel are sensitised to cultural and other aspects specific to the local community.⁴⁷⁰

One of the priority areas for training is mission managerial and senior leadership. Training of existing and prospective managers includes a session on conduct and discipline and the role of managers “as role models, to achieve an environment free from all types of misconduct”.⁴⁷¹ The CDU is also involved with Senior Mission Leaders’ programmes in Peacekeeping Centres globally and the DPKO Senior Leadership Induction Programmes. The UN is recognising that the hierarchical structure of a PSO, particularly given the fact that the majority of personnel in a PSO are military, means that the

⁴⁶⁶ *Ibid.*, para. 36. It is the role of P-3 and P-4 Conduct and Discipline Officers to provide training on the prevention of SEA and conduct and discipline in general; *ibid.*, para. 70.

⁴⁶⁷ *Ibid.*, para. 38.

⁴⁶⁸ *Ibid.*, para. 36. See also Overview of the financing of the United Nations peacekeeping operations: budget performance for the period from 1 July 2006 to 30 June 2007 and budget for the period from 1 July 2008 to 30 June 2009, Report of the Secretary-General, A/62/727, 30 April 2008, para. 78. (Hereinafter ‘Overview of financing’); A/62/890, para. 21; SG’s 2008 Report on Criminal accountability, *supra* note 461, para. 76.

⁴⁶⁹ SG’s 2008 Report on Criminal accountability, *supra* note 461, para. 87-8.

⁴⁷⁰ *Ibid.*

⁴⁷¹ Comprehensive report of conduct and discipline, *supra* note 451, para. 39.

role of managers and commanders in preventing and punishing SEA is extremely important. A significant part of the problem in the past has been the lack of willingness of leadership to take action over allegations of SEA, resulting in an increase in the occurrences of SEA due to an atmosphere of impunity. This accentuation on training of management and senior leadership has implications with regards to superior and command responsibilities, which will be further discussed in Chapter 5.

Another specific training drive that the CDU is tackling is the issue of use of prostitutes. The CDU has received funding for a pilot for an anti-prostitution campaign.⁴⁷² Missions in East Timor (UMIT), Haiti (MINUSTAH), Côte d'Ivoire (UNOCI), Democratic Republic of Congo (DRC) (MONUC), Liberia (UNMIL) and Sudan (UNMIS) are the missions currently running the pilot of the campaign.⁴⁷³ Each mission is approaching the campaign differently, with mission-specific strategies. MONUC is focussing on transactional sex/prostitution with minors, and is working with UN partners and NGOs. MINUSTAH and UNMIL are dealing with communication and outreach with more focus on prevention with the personnel and with the local population. In Sudan, workshops are being held and materials produced to target both personnel and the local community. As the campaign is newly established, its success is yet to be verified. Monitoring is budgeted into the campaign, and there will be evaluation of the campaign in the Northern Hemisphere Spring of 2009. Depending on the outcome of the evaluation, the campaign may be extended to all missions, although this will be dependent on external funding.

The extent of use of prostitutes by mission personnel has been shown in Chapter 2, and this provokes an understanding of just how vital such a campaign is within PSOs. The campaign should focus on the impact of prostitution (including its dramatic increase) on women and the local community, the illegality of sexual activity with minors, and the potential health implications of engaging in sexual relations under such circumstances.⁴⁷⁴ The campaign should also create

⁴⁷² Overview of financing, *supra* note 468, para. 78.

⁴⁷³ Information on the anti-prostitution campaign courtesy of Ms Yasna Uberoi, Headquarters CDU, email dated 8 August 2008, on file with the author; A/62-890, para. 22.

⁴⁷⁴ See *supra* Chapter 2.

awareness amongst personnel of the negative repercussions of engaging in prostitution-related activities within the local community. This includes impact on the relationship of the mission with the local community and the overall reputation of the PSO within the host state and the international community, and the fact that such repercussions can jeopardise mission effectiveness.⁴⁷⁵ Personnel need to be made aware of their role in re-building a post-conflict society,⁴⁷⁶ and that by proliferating prostitution amongst local women their actions are inimical to this role. Potential accountability for such behaviour should also be made clear, so that personnel are aware that there are consequences for violating mission standards, particularly if the misconduct amounts to a criminal offence. Finally, the positive and supportive actions that personnel can take instead should also be discussed, in order to assure that the campaign training does not concentrate on entirely negative aspects. The campaign could be combined with community reconstruction and development actions, looking to promote other ways for women to support themselves. There could also be a link with programs designed to combat trafficking, corruption and organised crimes.

3.2.6. The need for adequate welfare and recreation facilities for personnel in the field

In January 2008, a comprehensive review of the welfare and recreation needs of all categories of peacekeeping personnel was issued by the Secretary-General.⁴⁷⁷ The report reviews conditions of service of peacekeeping personnel, details the current status of reforms under consideration or in the process of implementation, surveys current welfare and recreation practices in missions, and identifies concerns and makes recommendations for addressing issues.

An emphasis is made on the need for increased attention to the well-being of peacekeeping personnel, to assist personnel with acceptance of the 'special constraints' in their private and public lives and to strengthen the resources of personnel to cope with the "distinct challenges of

⁴⁷⁵ See *supra* Chapter 2.

⁴⁷⁶ See e.g. M. Katayanagi, *Human Rights Functions of United Nations Peacekeeping Operations*, (Martinus Nijhoff Publishers, The Hague 2002).

⁴⁷⁷ Report of the Secretary-General, Comprehensive review of the welfare and recreation needs of all categories of peacekeeping personnel, A/62/663, 24 January 2008. (Hereinafter 'Comprehensive welfare review'.)

peacekeeping”.⁴⁷⁸ It is pointed out that “the provision to peacekeeping personnel of adequate opportunities for welfare and recreation forms an important part of the strategy to prevent serious misconduct on their part, particularly sexual exploitation and abuse”.⁴⁷⁹ In fact, the review

“is premised on the recognition that instances of failure of peacekeeping personnel to measure up to the prescribed standards of conduct not infrequently have to do with social and psychological challenges that face them in the broken societies amidst which they live and work. The proportionally higher incidence [sic] of misconduct among categories of personnel who are deployed individually and, therefore, are unable to draw on social reinforcements, and moral checks and balances that with deployment as formed bodies, is an example.”⁴⁸⁰

A previous independent study confirms the provision of adequate welfare and recreation facilities as an effective method for preventing SEA.⁴⁸¹ A case study details two units of UNAMSIL⁴⁸² with a curfew of 18.00, which had created a sense of ‘home’ in the barracks and messes “with well-organised recreational facilities, a mosque, sturdy accommodation constructions and an overall sense of pride in their ability to be largely self-sustaining”.⁴⁸³ The units had a range of activities organised on a daily basis, such as movie nights, cricket, football and weight-training, all of which contributed to the creation of a greater sense of camaraderie and provided an outlet for the boredom that can arise on mission deployments. Members of the unit expressed no desire to leave the unit when off-duty.

Other soldiers based in Freetown would maintain accommodation for local women with whom they engaged in sex with.⁴⁸⁴ A pattern of ‘gift exchange’ would emerge, where peacekeeping personnel formed ‘relationships’ with local women, providing them with accommodation, money and goods in exchange for sex, i.e. sexual exploitation. In other areas of Sierra Leone, UN personnel visited clubs,

⁴⁷⁸ *Ibid.*, para. 42.

⁴⁷⁹ *Ibid.*, para., 41.

⁴⁸⁰ *Ibid.*, para. 45.

⁴⁸¹ P. Higate, ‘Gender and Peacekeeping Case Studies: The DRC and Sierra Leone’ (Institute for Security Studies, March 2004) ISS Monograph No. 91, p. 45.

⁴⁸² UN Mission in Sierra Leone.

⁴⁸³ Higate, *supra* note 481.

⁴⁸⁴ *Ibid.*, p. 43.

bars and brothels to have sex with prostitutes. In comparison with the two units referred to above, there was no curfew and no provision for recreational activities for these personnel.⁴⁸⁵

In the case studies, the units that were provided with recreational facilities did not engage in any form of SEA, a stark comparison to other soldiers who were not provided with recreational facilities by the mission. Such case studies demonstrate the effectiveness in avoiding SEA through ensuring the welfare of peacekeeping personnel, and in particular the provision of recreational facilities. The implementation of a curfew and the provision of adequate welfare and recreational facilities will assure that personnel have activities to keep them occupied when off-duty, significantly decreasing the temptation to visit clubs, bars and brothels.⁴⁸⁶

In order to secure adequate leave for mission personnel, the Comprehensive welfare review recommends a review by DPKO of the current compensatory time off policy as well as the application of recreational leave allowance to be made admissible to contingent personnel for the 15 days of leave allowed in six months of deployment.⁴⁸⁷ The report found that some lower-paid categories of UN personnel (such as UN Volunteers) were not able to participate in welfare flights for recreational leave due to issues of affordability.⁴⁸⁸ It is recommended that the Department of Field Support re-examine the current policies limiting the number of people permitted to take such flights.⁴⁸⁹ Some missions provide group travel to places of interest outside the mission area for mission personnel on leave, which is an excellent practice enabling personnel to leave the confines of the mission area to refresh and rejuvenate.⁴⁹⁰ The report also recommends the establishment of designated leave

⁴⁸⁵ *Ibid.*

⁴⁸⁶ The effectiveness of this is demonstrated by a comparison of different national troops in East Timor. Those without a curfew or any restrictions visited bars and massage parlours; whereas those with restrictions did not. S. Koyama and H. Myrntinen, 'Unintended consequences of peace operations on Timor Leste from a gender perspective', in Aoi, et al. (eds.), *Unintended Consequences of Peacekeeping Operations*, (United Nations University Press, Tokyo, New York, Paris 2007), 23-43, pp. 35-36.

⁴⁸⁷ Comprehensive welfare review, *supra* note 477, paras. 20 and 24.

⁴⁸⁸ *Ibid.*

⁴⁸⁹ *Ibid.*, para. 37.

⁴⁹⁰ *Ibid.*, para. 38.

centres, where personnel can access facilities for rest and recuperation such as books, games and television. Accommodation and transport should also be provided at these centres.⁴⁹¹

Welfare needs cover a wide variety of issues, from provision of food and water to affordable transport for recreational leave breaks. The report recognises that welfare needs will vary from mission to mission, and that it is vital that welfare needs are assessed at the start-up phase of each mission.⁴⁹² Particular attention should be paid to security of personnel (particularly those located in remote mission posts), supply of food and potable water, and the maintaining of funds for the provision of welfare and recreational needs.⁴⁹³ Another key area is communication; peacekeeping personnel should have adequate access to communications such as internet and telephone, in order to be able to maintain contact with their families.⁴⁹⁴ This can help to avoid the sense of isolation that may be felt when deployed, especially if deployment is to a remote post. Working in a PSO, personnel may be engaging in long hours,⁴⁹⁵ highly stressful and distressing tasks in a tense environment, and they are doing so without the immediate support of family and friends. Dallaire writes of the horrific incidents he was forced to deal with in his time as commander of UNAMIR,⁴⁹⁶ of missing his family,⁴⁹⁷ and of how important communication and contact with his family was,⁴⁹⁸ but also how difficult this communication and contact was to undertake.⁴⁹⁹ Personnel cannot be left to mission duties in a void of support, be it logistical and practical or emotional, either within the mission or from external sources such as family.

On top of this, provision of recreational activities and facilities should be an essential element of any welfare practices. Minimum standards of facilities for welfare and recreation should “entail the

⁴⁹¹ *Ibid.*, para. 39.

⁴⁹² *Ibid.*, para. 25.

⁴⁹³ *Ibid.*, paras. 26-30.

⁴⁹⁴ *Ibid.*, paras. 31-32.

⁴⁹⁵ R. Dallaire, *Shake Hands With the Devil*, (Arrow Books, London 2003), p. 107. Dallaire mentions the pressure he and his staff were under, and the fact they were working day and night.

⁴⁹⁶ *Ibid.*, e.g., pp. 115-118, describing the rape and murder of a group of children; pp. 255 ff. describing the murder of members of the Belgian contingent; p. 325 having to move dead bodies out of the way of their vehicle.

⁴⁹⁷ *Ibid.*, pp. 127-128; 217.

⁴⁹⁸ *Ibid.*, p. 353; 470-471.

⁴⁹⁹ *Ibid.*, pp. 417-419; 470-471.

provision of installations, equipment and amenities enabling a range of outdoor and indoor sporting, social and cultural events”, such as televisions, stereos, fitness and sport equipment, games and reading library.⁵⁰⁰ A ‘welfare kit’ is also suggested for non-military personnel, comprising generic equipment such as an indoor gym, a multi-purpose recreation centre for use as an indoor lounge (including internet, indoor games, television and DVD/VCR player, board games and refreshments), a library, and a prayer/meditation room.⁵⁰¹ The detail provided in the Comprehensive welfare review is extremely valuable and should prove to be very beneficial to the DPKO and DFS as well as TCCs during the establishment of missions, as well as throughout the mission’s duration. Such facilities will assist personnel in coping with stress and boredom that may be experienced, existing as an outlet to relieve stress, as well as a method of ensuring personnel are able to be occupied with recreational activities when off-duty.

The importance of the provision of such facilities is confirmed in the new Model MoU provisions. Sending states are provided with funds for contingent members’ welfare.⁵⁰² Article 7(5) ter of the Model MoU requires a sending state government to use its welfare payments to provide adequate welfare and recreation facilities to its contingent members in the mission. Under the MoU, this is not an interdependent responsibility shared by the UN and states. This provision places the responsibility for provision of welfare and recreation facilities for military personnel on the sending states. While the Comprehensive welfare review suggests a ‘welfare kit’ for non-military equipment, it is the detail of implementation of this that is important. What must be addressed is how such welfare and recreational facilities are to be funded and which department or unit will undertake their installation and maintenance in-mission. There is a distinction created between facilities for military and non-military personnel, rather than mission-wide facilities. The provision of mission-wide facilities would ensure that facilities are maintained and retained, as sending states would be likely to remove facilities upon the departure of their own personnel. Mission-wide facilities would also ensure all

⁵⁰⁰ Comprehensive welfare review, *supra* note 477, paras. 47 and 50.

⁵⁰¹ *Ibid.*, para. 57.

⁵⁰² *Ibid.*, para. 52.

personnel have access to facilities, rather than the possibility of some personnel having access to only very basic facilities whilst other personnel have extensive facilities provided for them. This does not mean that sending states should not be obliged to provide welfare and recreation facilities, but that such facilities should be available to all mission personnel without distinction of role or position within the mission. One benefit of sending states providing facilities would be that it would establish culture-specific facilities, as different cultures engage in different recreational activities (e.g. different sports such as soccer or tennis). However, the UN needs to assure and monitor the provision of welfare and recreation facilities at each mission, rather than relying wholly on sending states. Particularly given the fact that sending states will only be providing facilities for their own contingent, the provision of welfare and recreation facilities should be a joint responsibility of states and the UN, to assure comprehensive provision of such facilities.

3.2.7. Recording and reporting of misconduct cases and data

The Zeid Report found that there was little data available on cases of SEA by peacekeeping personnel.⁵⁰³ This had already been flagged as an issue. Prior to the 2003 Zeid Report, the General Assembly directed the Secretary-General to maintain data on investigations into sexual exploitation and related offences. Since then, the Secretary-General has submitted annual reports to the General Assembly to comply with the request.⁵⁰⁴

The reports give a brief overview of new cases of SEA, and also outline progress in implementing special measures for protection from sexual exploitation and abuse undertaken in the previous calendar year. The latter reports are somewhat more detailed than the first one for 2003, adding tables of offences committed, demonstrated by categories of personnel (peacekeeping personnel and other UN agencies, as well as separating peacekeeping personnel into military and civilian personnel). Both the 2004 and 2005 reports declare: “in substantiated cases, the military personnel were repatriated on disciplinary grounds. The Department of Peacekeeping Operations is following

⁵⁰³ Zeid Report, *supra* note 427, paras. 41 and 62.

⁵⁰⁴ Secretary-General’s Reports of sexual exploitation and abuse investigation data, A/58/777 for 2003; A/59/782 for 2004; A/60/861 for 2005; A/61/957 for 2006; A/62/890 for 2007; A/63/720 for 2008.

up with Member States to obtain information on disciplinary and/or criminal action taken.”⁵⁰⁵ However, although encompassing a whole year following the 2004 report, the 2005 report makes no mention of any follow-ups actually undertaken or reports received relating thereto. Thus, there is no way of knowing whether or not the personnel that were repatriated received any kind of disciplinary action, or were subject to criminal prosecution. Nor do the reports mention the nationality of repatriated personnel. Such lack of transparency creates difficulty for anyone without access to internal UN files to conduct investigations into any potential disciplinary or criminal proceedings taken once the personnel were repatriated.

In the 2006 report, 13 investigations against military personnel were substantiated and all individuals were repatriated.⁵⁰⁶ This report does mention feedback received from two member states against seven military personnel, which included three demotions in rank, four custodial sentences and five dismissals from the armed services.⁵⁰⁷ Similar details are to be found in the 2007 report, which mentions ongoing criminal proceedings in one member state, and three other member states having taken action against 21 military personnel, resulting in three dismissals from service, six reprimands, seven imprisonments, one reduction in rank and imprisonment, and four dismissals from service and imprisonment.⁵⁰⁸ In addition, all such personnel are banned from participation in any UN missions. The 2008 report does mention that two states sentenced military personnel to 30 and 40 days imprisonment.⁵⁰⁹

States are slow to follow-up on prosecution. The 2007 report notes that one member state reported criminal proceedings were ongoing following the repatriation of 111 military personnel.⁵¹⁰ In the 2008 report, the same member state stated that these criminal proceedings were still ‘under review by its Ministry of Defence’.⁵¹¹ The CDU website contains statistics on UN follow-up with member

⁵⁰⁵ A/59/782 for 2004, para. 7; A/60/861 for 2005, para. 8.

⁵⁰⁶ A/61/957 for 2006, para. 9(a).

⁵⁰⁷ *Ibid.*

⁵⁰⁸ A/62/890 for 2007, para. 9(a).

⁵⁰⁹ A/63/720 for 2008, para. 11(a).

⁵¹⁰ A/62/890 for 2007, para. 9(a).

⁵¹¹ A/63/720 for 2008, para. 11(a).

states.⁵¹² These statistics show that member states are not providing responses to follow-up requests. The UN needs to continue to pressure states in situations such as this, to ensure the state does take action. Again, the statistics do not detail which member states are concerned. It may be useful to maintain complete transparency, as states would be more likely to respond to requests if their performance was made public, and therefore open to criticism or commendation.

One of the purposes of the CDU has been to develop a database of misconduct allegations, and investigations. Creating a database of misconduct allegations will enable the UN to effectively monitor misconduct cases and trends, as well as meet the Secretariat's reporting obligations to legislative bodies.⁵¹³ A database of offenders when allegations are substantiated will be part of a wider vetting policy. The database has been operational for approximately four years. It is a web-based file-storage system called CyberArk, and facilitates the secure storage, transmission, receipt of and access to documents on cases of misconduct.⁵¹⁴ In 2008 the UN created a more comprehensive Misconduct Tracking System, which will enable sharing of data and information by CDU Headquarters and mission CDUs, including permitting the input of new information by mission CDUs.⁵¹⁵ Coordination with OIOS to ensure compatibility and completeness of data is ongoing.⁵¹⁶

There is no central database yet; and currently the database contains only DPKO cases.⁵¹⁷ Details of individuals repatriated for misconduct are entered into the database, including reasons for repatriation and that s/he will not be considered for further service in any PSO.⁵¹⁸ There is a formal policy for senior officers, however the CDU believes that it will not be possible to vet all troops, and that in the end this will have to be up to the TCCs to undertake.

⁵¹² UN follow-up with member states (sexual exploitation and abuse), <http://cdu.unlb.org/Statistics/UNFollowupWithMemberStatesSexualExploitationandAbuse.aspx>; UN follow-up with member states (excluding sexual exploitation and abuse) <http://cdu.unlb.org/Statistics/UNFollowupWithMemberStatesExcludingSexualExploitationandAbuse.aspx>.

⁵¹³ Comprehensive report of conduct and discipline, *supra* note 451, para. 21.

⁵¹⁴ *Ibid.*

⁵¹⁵ *Ibid.*; A/63/720 for 2008, para. 15.

⁵¹⁶ *Ibid.*

⁵¹⁷ As of early 2008.

⁵¹⁸ Comprehensive report of conduct and discipline, *supra* note 451, para. 30.

The UN currently finds that once immunity *ratione materiae* has been waived, the Secretariat is “generally not provided information regarding difficulties, including evidentiary issues, that might arise in criminal proceedings instituted before national jurisdictions”.⁵¹⁹ This will hopefully be an issue that will be addressed by the new investigation coordination and information sharing provisions of the MoU, and the database constructed by the CDU, which in turn will enable UN actions regarding cooperation to be amended to ensure the least possible procedural problems for state criminal proceedings.

This section has established that the UN is taking action towards the prohibition and prevention of SEA. The UN, particularly through the CDU, is actively seeking to create a more effective system of prevention and reporting. However, should SEA be committed, there is a need for punishment through criminal prosecution. As demonstrated in this section, the UN can only take administrative action, not criminal. Thus, there are further procedures required to ensure that when SEA is committed, it is not done so with impunity. The following section will address the first issue related to prosecution of peacekeeping personnel, namely the question of which state has jurisdiction over the personnel.

3.3. Jurisdiction

Thus far in this chapter, the actions of the UN regarding prohibition and prevention of SEA have been discussed. Prevention is certainly the ideal situation, but there also need to be punitive measures in force to ensure accountability for when such misconduct does occur. While the UN can impose administrative punishments for personnel committing SEA, the UN does not have the ability to undertake criminal prosecution.⁵²⁰ Jurisdiction is a complicated issue in relation to peacekeeping personnel. As mentioned in Chapter 2, jurisdiction of a state is the power of that state to govern persons and property; prescriptive jurisdiction is the right to prescribe laws, and enforcement

⁵¹⁹ Second session report of the Ad Hoc Committee, *supra* note 621, para. 31.

⁵²⁰ The juridical capacity of the UN consists of the capacity: “(a) to contract; (b) to acquire and dispose of in movable and movable property; (c) to institute legal proceedings.” Convention on the Privileges and Immunities of the United Nations, 1 UNTS 15, 13 February 1946; Article I, Section 1.

jurisdiction is the power to enforce such laws.⁵²¹ Jurisdiction has traditionally been viewed as linked to state sovereignty, and is territorial.⁵²² However, it is also accepted that, provided there is no specific rule to the contrary, jurisdiction may be enacted extra-territorially.⁵²³ “The only prohibitive rule... is that criminal jurisdiction should not be exercised, without permission, within the territory of another state”.⁵²⁴ “This discretion left to States by international law explains the great variety of rules which they have been able to adopt without objections or complaints on the part of other States.”⁵²⁵ Such rules include those applicable during PSOs. In addition, jurisdiction is not limited to national territory when acts of state authorities produce effects outside their own territory.⁵²⁶ Actions of peacekeeping personnel inevitably produce effects outside the territory of their sending state or state of nationality. Of the various instruments relative to the establishment of a PSO, two govern jurisdiction over personnel.

The first of these is a Status of Forces Agreement (SOFA), which is an agreement between the UN and a host state. The agreement covers issues like transport and communications, as well as privileges and immunities of the PSO.⁵²⁷ Under paragraph 47(b), military personnel are deemed to be subject to the exclusive jurisdiction of their sending state for any criminal offences committed within the host state or territory. The SOFA requires the Secretary-General to obtain guarantees from troop contributing countries (TCCs) that they “will be prepared to exercise jurisdiction with respect to crimes or offences which may be committed by members of their national contingents serving with the peace-keeping operation”.⁵²⁸ Such text offers no obligation on the part of sending states, as the

⁵²¹ I. Brownlie, *Principles of Public International Law*, 7th ed., (Oxford University Press, Oxford 2008), p. 299; M. Dixon and R. McCorquodale, *Cases And Materials On International Law*, 4th ed., (Oxford University Press, Oxford 2003), p. 268; D. Harris, *Cases and Materials on International Law*, 6th ed., (Sweet & Maxwell, London 2004), p. 265.

⁵²² *The Case of the S.S. “Lotus”, France v Turkey*, PCIJ, Ser. A, No. 10 (1927) (*Lotus Case*), pp. 18, 20; Dixon and McCorquodale, *ibid.*, p. 268.

⁵²³ *Lotus Case*, pp. 19, 20.

⁵²⁴ Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v Belgium*), (*Arrest Warrant Case*), ICJ, General List No. 121, (2002), Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 54.

⁵²⁵ *Ibid.*, p. 19.

⁵²⁶ *Droz and Janousek v France and Spain*, Application no. 12747/87, Judgment 26 June 1992, para. 91.

⁵²⁷ A/45/594, Annex, paras. 15, 24-31. Jurisdiction is covered in paragraphs 46-49.

⁵²⁸ *Ibid.*, para. 48.

sending state is not a party to a SOFA. Additionally, should the Secretary-General obtain the required guarantee, it is only a guarantee *to be prepared to* exercise jurisdiction, and not one to definitively exercise that jurisdiction.

The second instrument to address jurisdiction is the mission MoU. As has been mentioned *supra*, the Model MoU which is used as a template for MoUs concluded for all PSOs has been amended to include provisions on sending states' criminal jurisdiction over their troops.⁵²⁹ There are two new provisions particular to jurisdiction with regards to discipline and criminal offences.

Under Article 7 ter Discipline, discipline and good order of national contingent members are the responsibility of the national commander. The sending state must secure the authority of the commander to take reasonable measures to maintain discipline and good order of the national contingent members in compliance with standards of conduct, and rules and regulations. A national commander must inform the Force Commander of any serious matters relating to discipline and good order including disciplinary action taken for violations of the standards of conduct or mission rules and regulations, or for failure to respect the local laws and regulations.

The sending state is obliged to train the national commander pre-deployment to enable the national commander to fully discharge their responsibilities in maintaining discipline and good order.

Another new provision confirms that military personnel are subject to the exclusive jurisdiction of the sending state in respect of any crimes or offences committed by them whilst assigned to a PSO.⁵³⁰ "The Government assures the United Nations that it shall exercise such jurisdiction with respect to such crimes or offences."

Under the MoU the government is also obligated to "exercise such disciplinary jurisdiction as might be necessary with respect to all other acts of misconduct committed by any members of the

⁵²⁹ The amendments are set out in the Report of the Special Committee on Peacekeeping Operations, A/61/19 (Part III), and were adopted by the General Assembly in a resolution on Comprehensive review of the whole question of peacekeeping operations in all their aspects, A/RES/61/291, 24 August 2007.

⁵³⁰ Article 7 quinquies Exercise of jurisdiction by the Government.

Government's national contingent while they are assigned to the military component of [United Nations peacekeeping mission] that do not amount to crimes or offences."

Article 7 quinquies of the revised draft MoU thus clearly requires a troop-contributing state to ensure they have adequate criminal jurisdiction over its national contingent. It enforces this in conjunction with paragraphs 47(b) and 48 of the SOFA.⁵³¹ This requirement enacts the nationality principle⁵³² and is two-fold: a state must ensure not only that the subject-matter jurisdiction is comprehensive, but that such jurisdiction is able to be exercised extra-territorially. This two-fold requirement may result in a void in the potential of sending states to exercise jurisdiction. For example, while a state may ensure all of its criminal law is applicable extraterritorially, the substantive criminal law may not be wide-ranging; for example, there may be no provisions proscribing sexual exploitation.⁵³³

It is evident from both the SOFA and the MoU that there are two main categories of personnel: military and civilian. Military personnel are subject to the exclusive jurisdiction of their sending state. The status of civilian personnel is somewhat unclear. As the SOFA suggests, civilian personnel are subject to host state jurisdiction. However, as has already been raised, the issue of whether or not the host state is able to undertake prosecution creates a problematic praxis. This lacuna has been addressed by the General Assembly in its Resolution of Criminal accountability of UN officials and experts on mission,⁵³⁴ and in the Draft Convention on criminal accountability of UN officials and experts on mission.⁵³⁵ The Draft Convention also attempts to address the potential jurisdictional gaps that may arise with regards to the enactment of jurisdiction by sending states over military personnel. Unfortunately, as discussed below, neither instrument is a wholly adequate solution to

⁵³¹ Although it must be recalled, as mentioned *supra*, that the SOFA is only binding on the host state and not the sending state.

⁵³² A state may enact jurisdiction over its own nationals regardless of where a crime was committed; Brownlie, *supra* note 521, pp. 303-4.

⁵³³ See Chapter 4 for further discussion.

⁵³⁴ A/RES/62/63, 8 January 2008; A/RES/63/119, 11 December 2008.

⁵³⁵ Report on ensuring accountability, *supra* note 447.

these jurisdictional gaps. The Draft Convention could potentially be a comprehensive resolution of all gaps, but to do so it must be reworked and eventually adopted as a convention.

The GA has adopted two resolutions calling for states to take all appropriate measures to ensure accountability for crimes committed by UN officials and experts on mission.⁵³⁶ The resolutions

“*strongly urge[] all States to consider establishing to the extent that they have not yet done so jurisdiction, particularly over crimes of a serious nature, as known in their existing domestic criminal laws, committed by their nationals while serving as United Nations officials or experts on mission, at least where the conduct as defined in the law of the State establishing jurisdiction also constitutes a crime under the laws of the host State*”.⁵³⁷

States are encouraged to cooperate with each other and the UN in relation to information sharing and coordination of investigations, as well as the prosecution of UN officials and experts on mission alleged to have committed serious crimes.⁵³⁸

The resolutions also request the Secretariat to create awareness in sending states of expectations of standards of conduct of personnel, to strengthen existing training on standards of conduct, and to bring any credible allegations of criminal misconduct to the attention of the state against whose nationals such allegations are made.⁵³⁹

While it is encouraging that the GA has adopted resolutions addressing the issue of SEA, the resolutions are not strongly worded. The resolutions are positive steps taken by the GA, but it must be recalled that a GA resolution is only soft law,⁵⁴⁰ and offers no binding obligations over member

⁵³⁶ A/RES/62/63, 8 January 2008; A/RES/63/119, 11 December 2008. Experts on mission include military observers, military liaison officers, military advisers, arms monitors, members of formed police units, seconded individual UN police and seconded corrections officers; SG’s 2008 Report on Criminal accountability, *supra* note 461, para. 65.

⁵³⁷ A/RES/62/63; A/RES/63/119, para. 3.

⁵³⁸ *Ibid.*, para. 4.

⁵³⁹ *Ibid.*, paras. 5, 6 and 9.

⁵⁴⁰ In fact, it has been stated that “the GA is also a political organ, which does not make it an ideal forum for establishing the law”; M.D. Öberg, ‘The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ’ (2005) 16 (5) *European Journal of International Law* 879-906, p. 902, with reference to Skubiszewski, ‘Resolutions of the U.N. General Assembly and Evidence of Custom’, in *Le droit international à l’heure de sa codification- études en l’honneur de Roberto Ago* (Vol. I) (1987) 503, pp. 506-7. See also Harris, *supra* note 521, p. 62, n. 75, referring to GA Resolutions as “a major source of ‘soft law’”; M. Koskeniemi, ‘The Police in the Temple; Order, Justice and the UN: A Dialectical View’ (1995) 6 *European Journal of International Law* 325-348, p. 336, referring to the dichotomy between hard UN law of the Security Council and soft UN law of the General Assembly.

states.⁵⁴¹ This is particularly so given the terminology used in the resolutions, “strongly urges”, “requests” and “encourages”; as opposed to more demanding or requiring language.⁵⁴² States are not urged to establish jurisdiction over crimes committed by their nationals, they are urged only to *consider* establishing such jurisdiction. Thus the resolutions can be deemed recommendations rather than decisions, rendering them non-binding.⁵⁴³ Further, the resolutions only cover UN officials and experts on mission, and not national military personnel. The most effective aspects of the resolutions are that they require constant action by the UN, with the continued support for the Ad Hoc Committee on criminal accountability of UN officials and experts on mission,⁵⁴⁴ and the requirement that the Secretary-General report to the GA on the implementation of the resolution.⁵⁴⁵ Such support indicates that the issue of sexual exploitation and abuse by peacekeeping personnel will continue to be addressed not just by the Secretariat, the CDU and the OLA, but also by the member states of the UN within the GA.

3.3.1. Draft Convention on the criminal accountability of UN officials and experts on mission

A Group of Legal Experts was appointed to examine the problem of accountability of UN staff and experts on mission following the recommendation of the Zeid Report, including examining recommendations made in the Zeid Report. The limited mandate of the Group of Legal Experts as concerns the categories of personnel is due to the fact that jurisdiction over military personnel is granted exclusively to the sending state, under paragraph 47(b) of the model SOFA.⁵⁴⁶ As a result, the Group of Legal Experts issued a report on ensuring accountability of UN staff and experts on mission with respect to criminal acts committed in peacekeeping operations.⁵⁴⁷ The report addresses jurisdictional issues, as well as definitional problems, and ultimately recommends the adoption of a

⁵⁴¹ Brownlie, *supra* note 521, p. 15.

⁵⁴² Öberg, *supra* note 540, p. 880.

⁵⁴³ *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962 ICJ Reports 1962, p.151, at 163.

⁵⁴⁴ Para. 9.

⁵⁴⁵ Para. 10.

⁵⁴⁶ A/45/594, Annex; jurisdiction is covered in paragraphs 46-49.

⁵⁴⁷ Report on ensuring accountability, *supra* note 447.

new convention to address specific jurisdictional and related issues. This chapter will analyse some provisions of the Draft Convention on the criminal accountability of UN official and experts on mission.⁵⁴⁸

An international convention is recommended by the Group of Legal Experts in order to ensure a binding obligation on states to extradite or prosecute, address other issues that facilitate the effective exercise of jurisdiction by states (e.g. extradition and evidence), create greater consistency for matters such as the scope of the crimes covered, and express the importance the international community places on the problem of serious crimes, especially sexual exploitation and abuse, being committed by peacekeeping personnel.⁵⁴⁹

The Group points out two disadvantages of an international convention, namely the lengthy period of time it can take for a convention to be negotiated, adopted and to come into force; and that the convention will only bind state parties.⁵⁵⁰ However, several suggestions are made of possible measures that may mitigate these disadvantages.⁵⁵¹ that the General Assembly can adopt a resolution calling on member states to establish jurisdiction over crimes committed by their nationals in PSOs,⁵⁵² and the addition of provisions on criminal accountability to MoUs for not only troop-contributing agreements, but also for those that cover contributions of personnel other than military contingents, such as formed police units.⁵⁵³ A third possible measure is suggested. The Group pointed out the number of persons who are available for posts in PSOs often exceeds the number of available posts. Therefore, the DPKO, when deciding who to appoint to a post, could apply the criterion of whether the state of nationality of a potential personnel member has established jurisdiction over crimes committed by their nationals on a PSO. This last suggestion may work in relation to the

⁵⁴⁸ Report on ensuring accountability, *ibid.*, Annex III.

⁵⁴⁹ Report on ensuring accountability, *ibid.*, para. 63.

⁵⁵⁰ *Ibid.*, para. 64.

⁵⁵¹ *Ibid.*, para. 65.

⁵⁵² As discussed *supra*, this has since been done with the General Assembly Resolutions on Criminal accountability of United Nations official and experts on mission, A/RES/62/63, 8 January 2008; A/RES/63/119, 11 December 2008.

⁵⁵³ Also discussed *supra*, the model MoU has been amended to include provisions on sending states' criminal jurisdiction over their troops.

recruitment of officials and experts on mission but would be difficult to apply in reality in relation to troops, as the UN already has difficulty obtaining the necessary number of troops for missions (e.g. for the new African Union-UN hybrid mission in Sudan).⁵⁵⁴

An analysis of the Draft Convention put together by the Group of Legal Experts must take into account, as the Group points out, that “this is no more than a preliminary draft for the purposes of illustrating how a convention might look and what issues it could address”.⁵⁵⁵ The Group states the aim of the convention to be the creation of “conditions which make it easier for any applicable immunity to be waived, without prejudice to the rights of the alleged offender”.⁵⁵⁶ The Draft Convention “sets out obligations on the part of States parties to take measures to investigate, arrest, prosecute and extradite offenders and to render mutual legal assistance [and] to protect the rights of victims”.⁵⁵⁷ The Draft Convention has potential, but much work would be needed before such a convention could or would be finalised and accepted by states.⁵⁵⁸ A significant number of provisions of the Draft Convention deal with jurisdiction, and these are discussed in this section.

3.3.1.1. Definitions

Article 1 of the Draft Convention sets out definitions of peacekeeping operations and UN officials and experts on mission. The Group recognises that the definition of ‘United Nations peacekeeping operations’ provided is limited, as a consequence of the terms of reference of the Group. The definition given covers only operations for the purpose of maintaining or restoring international peace and security.⁵⁵⁹ The Group states that there “is no reason why the provision of the present Draft Convention cannot extend to crimes committed during peacebuilding or other humanitarian

⁵⁵⁴ Department of Public Information, ‘Sudan Must Live Up To Commitment To Remove Obstacles Hindering Full Deployment Of African Union-United Nations Darfur Mission, Security Council Told’, Security Council 5915th Meeting (AM), 18 June 2008, <http://www.un.org/News/Press/docs/2008/sc9363.doc.htm>.

⁵⁵⁵ Report on ensuring accountability, *supra* note 447, para. 67.

⁵⁵⁶ *Ibid.*, para. 68.

⁵⁵⁷ *Ibid.*

⁵⁵⁸ This is confirmed by subsequent meetings of the Sixth Committee discussing Criminal accountability of UN officials and experts on mission. While some states, such as those in the European Union (EU), CANZ (Australia, Canada and New Zealand), and the Caribbean Community (CARICOM) are in favour of an international convention, others are more reluctant (such as Russia, Egypt and the Non-aligned Movement [NAM] states). United Nations Sixth Committee, Summary record of the 5th meeting (2008), A/C.6/63/SR.5.

⁵⁵⁹ Article 1(b). The definition is taken from the Convention on the Safety of United Nations and Associated Personnel, 2051 UNTS 363, entered into force 15 January 1999, *see* fn 9 to Article 1(b) of Draft Convention.

operations”.⁵⁶⁰ This should in fact be the case. A more comprehensive scope of the situations in which such a convention would apply would be more appropriate. There is little point in drafting a convention aimed at ensuring criminal accountability that only covers certain mission situations and leaves personnel participating in other categories of missions not subject to criminal accountability mechanisms.⁵⁶¹ There is a need for uniform application of rules to all types of missions. This will create less confusion and less difficulty in ascertaining whether or not the Convention is applicable at any given time. Both states and personnel will benefit from greater ease of organising, applying and following the appropriate applicable law.

‘United Nations officials and experts on mission’ is taken to mean “members of a [UN] peacekeeping operation to whom article V or article VI of the [Convention on the Privileges and Immunities of the United Nations] applies, in whole or in part”.⁵⁶² In the Report on Ensuring Accountability, the Group states that it understands UN officials to include UN staff and UN Volunteers, and experts on mission to include UN police, military observers, military advisers, military liaison officers and consultants. Another report on criminal accountability of UN officials and experts on mission also lists arms monitors, members of formed police units, seconded individual UN police and seconded corrections officers.⁵⁶³ There is no indication of whether the Group’s list is a comprehensive list, and it is not included in the text of the Draft Convention. This is not necessarily a negative exclusion, as a broader definition of who the convention applies to will help ensure no personnel are excluded from the scope of the convention by a restrictive and exhaustive definition.

The Draft Convention has an optional definitional clause to provide application of the Draft Convention to ‘other’ officials and experts on mission, including those from specialised agencies and those to whom Article 105 of the UN Charter is applicable, which will cover personnel from states

⁵⁶⁰ Fn 9 to Article 1(b).

⁵⁶¹ M. O’Brien, ‘Issues of the Draft Convention on the Criminal Accountability of United Nations Officials and Experts on Mission’, in Quénivet and Shah-Davis (eds.), *International Law and Armed Conflict: Challenges in the 21st Century*, (TMC Asser Press, The Hague 2010), 57-75, p. 62.

⁵⁶² Article 1(d)(i).

⁵⁶³ SG’s 2008 Report on criminal accountability, *supra* note 461, para. 65.

who are not parties to the Convention on the Privileges and Immunities.⁵⁶⁴ Again, this is a broad definition to cover a less specific group of personnel.

3.3.1.2. Scope of application

The limited scope of application *ratione personae* of the Draft Convention is the biggest lacuna in the Draft Convention.⁵⁶⁵ The Draft Convention applies exclusively to UN officials and experts on mission. Article 2(2) expressly excludes from the scope of the Draft Convention, military personnel of national contingents and other personnel who are subject to the exclusive jurisdiction of a state other than the host state under provision of a SOFA and MoU. While the scope of the Draft Convention was so applied in keeping with the terms of reference of the Group of Legal Experts to cover only officials and experts on mission, an international convention on criminal accountability for peacekeeping personnel should not exclude any members of the mission. Perhaps it is assumed that national laws adequately cover criminal accountability of military personnel for crimes committed during PSOs given that sending states are granted exclusive jurisdiction over their military personnel, but this is not necessarily the case. States not only require laws that cover the subject-matter jurisdiction of SEA (and indeed, any other crimes), but these must be applicable extra-territorially. Not all states have such laws enacted, and a convention obligating states to do so should cover all personnel participating in PSOs.⁵⁶⁶ For example, as will be shown in Chapter 4, of the two example states analysed, Australia and the United States, neither country has legislation covering the crime of sexual exploitation when committed by military forces or CivPol.⁵⁶⁷ The closest provision in US military law is

⁵⁶⁴ Article 1(d)(ii).

⁵⁶⁵ Article 2 Scope of application.

⁵⁶⁶ While many states report that their criminal laws are applicable extra-territorially, the extra-territorial application of criminal law is irrelevant if there is no substantive provision outlawing, *e.g.*, sexual exploitation; SG's 2008 Report on criminal accountability, *supra* note 461.

⁵⁶⁷ Nor do they have such a legislative provision applicable to national civilians. Australia does have provisions prohibiting child sex tourism (sexual offences with children overseas), which are specifically applicable extra-territorially. These provisions could be used to prosecute an Australian national for sexual exploitation of a child; however they are not specific to sexual exploitation and apply only to crimes against children. Part IIIA Child Sex Tourism *Crimes Act* (Cth) 1914.

a 2005 amendment to Article 134 of the US Uniform Code of Military Justice (UCMJ), which outlaws patronising a prostitute.⁵⁶⁸

The scope of the Draft Convention is also limited to exclude applicability to UN operations authorised as an enforcement action under Chapter VII of the UN Charter, “in which a [UN] official or expert on mission is engaged as a combatant against organised armed forces and to which the law of international armed conflict applies”.⁵⁶⁹ In this situation, criminal liability may be, according to the Group, provided for under international humanitarian law (IHL), such as the Geneva Conventions,⁵⁷⁰ but it is still necessary that a state undertakes legal proceedings, and that that state has the relevant laws to be able to carry out such proceedings in the first place. According to the Secretary-General’s Bulletin on Observance by United Nations forces of international humanitarian law, IHL rules are applicable in an enforcement action, but also when personnel are engaged in a PSO in which the use of force for self-defence is mandated.⁵⁷¹ Hence, it may be asked why the Draft Convention is limited to exclude enforcement actions where IHL is applicable, but not missions in which IHL is applicable due to the permissibility of use of force for self-defence.

To a certain extent, this exclusion of the Draft Convention’s applicability during times when IHL is applicable is logical. Certain actions which would constitute a crime outside the arena of armed conflict are not necessarily deemed a crime when carried out during armed conflict. An example of this is murder or assault, which have specific definitions under IHL that enables combatants to lawfully kill or assault someone within the confines of armed conflict.⁵⁷² IHL is a *lex specialis*, and

⁵⁶⁸ Amendment to Sec. 3 Part IV, ¶ 97, Article 134- (Pandering and prostitution). Amended by Executive Order 13387-2005, Amendments to the Manual for Courts-Martial, October 18, 2005, 70 Fed. Reg. 60701; amendment came into effect on 1 October 2007.

⁵⁶⁹ Article 2(3).

⁵⁷⁰ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85; Geneva Convention relative to the Treatment of Prisoners of War, 75 UNTS 135; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287; all Geneva Conventions entered into force 21 October 1950.

⁵⁷¹ Secretary-General’s Bulletin, Observance by United Nations forces of international humanitarian law, ST/SGB/1999/13, 6 August 1999.

⁵⁷² The war crimes of wilful killing and wilfully causing great suffering or serious injury to body or health are the IHL equivalents, and require a specific *mens rea* and *actus reus* distinct from murder or assault under ordinary criminal law; see the Elements of Crimes of the Rome Statue of the International Criminal Court,

serves to ensure a balance between military necessity and humanitarian considerations, aiming to diminish suffering and protect civilians while maintaining the effectiveness of military operations.⁵⁷³

Thus the requirement of applicability of the crimes covered in the Draft Convention may result in unjust criminal prosecution for actions performed in armed conflict.

However, the counter-argument is that IHL may not necessarily cover all criminal behaviour which may fall under SEA, which can still be committed by peacekeeping personnel during armed conflict.⁵⁷⁴ This will depend on a state's national laws, including whether their interpretation of IHL is expansive enough to cover crimes that may not necessarily be specifically stated in legislation or codes.⁵⁷⁵ National domestic laws being enacted to implement the crimes under the Rome Statute of the International Criminal Court are a step towards ensuring that violations of IHL are more comprehensively criminalised, but not all states have comprehensive war crimes legislation. An effective example of this is the comparison between Australian, UK and US war crimes law. Australia has enacted extensive and detailed legislation to cover the crimes of the Rome Statute, whereas the US has extremely limited war crimes legislation. The Australian and UK legislation essentially adopts the terminology from the Rome Statute, including the gender-based crimes, outrages upon personal dignity and sexual violence.⁵⁷⁶ The US War Crimes Act covers only Grave Breaches and Common Article 3 violations.⁵⁷⁷ The US is not a party to either of the Additional Protocols to the Geneva

Articles 8(2)(a)(i) and 8(2)(a)(iii) (Grave Breaches of the Geneva Conventions of 12 August 1949); and Article 8(2)(c)(i) (serious violations of Common Article 3 of the Geneva Conventions).

⁵⁷³ Y. Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, 2nd ed., (Cambridge University Press, Cambridge 2010), pp. 4-5; M. Sassoli and A.A. Bouvier, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, (International Committee of the Red Cross, Geneva 1999), pp. 67-68.

⁵⁷⁴ Alternatively, for military personnel, the crime may be charged as a military-specific offence such as conduct unbecoming or failure to obey order or regulation, which fails to recognise the seriousness of the crime of sexual exploitation. See, e.g., US UCMJ, 10 U.S.C. § 892. Art. 92; § 933. Art. 133.

⁵⁷⁵ This may also depend on prosecutorial discretion with regard to interpretation of potential offences with which to charge perpetrators.

⁵⁷⁶ *Criminal Code Act* (Cth) 1995, Chapter 8- Offences against humanity and related offences, Division 268- Genocide, crimes against humanity, war crimes and crimes against the administration of the justice of the International Criminal Court, Subdivision E- Other serious war crimes that are committed in the course of an international armed conflict, ss. 268.58 and 268.64; International Criminal Court Act 2001, Part 5 Offences under Domestic Law.

⁵⁷⁷ 18 U.S.C. § 2441(c). There are also other war crimes from the Hague Convention IV, Respecting the Laws and Customs of War on Land and the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps

Conventions, and thus the crimes of “rape, forced prostitution and other indecent assault” of women and children are not found within the War Crimes Act.⁵⁷⁸ Thus, to ensure criminal responsibility for sexual exploitation if IHL were applicable, the US would be obligated to deem sexual exploitation to fall under the Grave Breaches,⁵⁷⁹ such as inhuman treatment, or wilfully causing great suffering or serious injury to body or health; or one of the defined Common Article 3 violations such as cruel or inhuman treatment, rape, or sexual assault or abuse.⁵⁸⁰ Without a broad interpretation of war crimes offences, the non-applicability of the Draft Convention during times when IHL is applicable will result in a void enabling peacekeeping personnel to commit certain crimes without binding criminal accountability.

3.3.1.3. Establishment of jurisdiction

State parties are required to “take such measures as may be necessary to establish jurisdiction over the crimes set out in article 3,” and to establish territorial and nationality jurisdiction.⁵⁸¹ The Draft Convention also obliges state parties to establish *aut dedere aut judicare* (extradite or prosecute) jurisdiction.⁵⁸² State parties “may” also establish passive personality jurisdiction and jurisdiction over a stateless person who has his or her habitual residence in the territory of the state.⁵⁸³ Each state party must notify the Secretary-General of any measures taken to establish such jurisdiction, and any subsequent changes.⁵⁸⁴ This requirement should ensure both the effectiveness and compliance of the convention.⁵⁸⁵ Notification by a state to the Secretary-General will demonstrate observable

and Other Devices. The US is not a party to the Rome Statute, but this does not prevent the US from enacting comprehensive war crimes legislation.

⁵⁷⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3, entered into force Dec. 7, 1978, Article 76.

⁵⁷⁹ E.g. Art 147, Geneva Convention relative to the Protection of Civilian Persons in Time of War.

⁵⁸⁰ 18 U.S.C. § 2441(d). Unfortunately, this is unlikely to happen, as the United States retains a policy that only non-US nationals will be charged with war crimes; see discussion *infra* Chapter 4.

⁵⁸¹ Article 4(1) Establishment of jurisdiction.

⁵⁸² Article 4(4).

⁵⁸³ Article 4(2), emphasis added.

⁵⁸⁴ Article 4(3). There are similarities between the Draft Convention Art. 4 and Art. 10 of the Convention on the Safety of United Nations and Associated Personnel; M.-C. Bourloyannis-Vrailas, 'The Convention on the Safety of United Nations and Associated Personnel' (1995) 44 *International and Comparative Law Quarterly* 560-590, pp. 578-580.

⁵⁸⁵ K. Raustiala, 'Form and Substance in International Agreements' (2005) 99 (3) *The American Journal of International Law* 581-614, p. 610.

changes in behaviour of states, attesting to not only compliance by states, but also effectiveness of the convention, as states will be aware that their measures taken will be under scrutiny.⁵⁸⁶

Article 4(6) allows for the exercise of any criminal jurisdiction “established by a State party in accordance with its national law”, which the Group points out “does not preclude a State party from asserting jurisdiction beyond that provided for under the Draft Convention if permissible by general international law”.⁵⁸⁷

3.3.1.4. Investigations and the taking into custody of an alleged offender

The Draft Convention includes a provision on investigations and the taking into custody of an alleged offender.⁵⁸⁸ It applies to the enactment of territorial, and *aut dedere aut judicare* territorial jurisdiction. A state party is required to investigate and, if circumstances warrant it, take the alleged perpetrator into custody for either prosecution or extradition- if the alleged perpetrator is within the territory of the state, or has committed a crime within the territory of the state. This provision thus ensures there is no safe haven for a non-national within the territory of a state party, as they can be arrested for any crimes falling under the Draft Convention they may have committed.

However, there is no obligation to investigate and/or arrest an alleged perpetrator who is a national of the state party and has committed a crime in the host state while engaged on a PSO, and is still located in the host state.⁵⁸⁹ Thus, there is once again a gap in obligations for states in the Draft Convention. This enables a perpetrator to avoid criminal accountability by not returning to his/her country, as that state is not obligated under the convention to investigate unless the alleged perpetrator is within that state’s territory. While the Group placed an emphasis on the fact that the host state should be the primary source of criminal jurisdiction, this may not always be possible, and in fact, if the Draft Convention is amended to apply to military personnel, the host state may not

⁵⁸⁶ O’Brien, *supra* note 561, p. 68.

⁵⁸⁷ Article 4(6) and accompanying fn 33.

⁵⁸⁸ Article 6 Investigations and the taking into custody of an alleged offender.

⁵⁸⁹ Of course, if the host state is a party to the convention, it will be obligated to investigate and/or arrest a perpetrator.

have jurisdiction at all over that category of personnel due to SOFA and MoU provisions.⁵⁹⁰ The Draft Convention should not simply provide for the ideal situation, but incorporate provisions to deal with any potential jurisdictional situation that may arise.⁵⁹¹ Such a provision could provide for the primacy of host state jurisdiction, but failing that, a state party should be obligated to investigate and take into custody any of its nationals even when they are still located in the host state. While it is generally true that a state's jurisdiction is territorial, this concept is flexible in international law, which leaves states "a wide measure of discretion" with regards to the "application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory".⁵⁹² Such a discretionary situation is found in the context of PSOs, when it is the sending state which retains criminal jurisdiction over its personnel. This criminal jurisdiction must be able to be physically enacted, and considering the move towards cooperation between sending states, the host state, and the UN, it would be beneficial and practical to allow sending states to undertake investigate and take an offender into custody within the host state.

3.3.1.5. Prosecution and extradition of offenders

The Draft Convention applies *aut dedere aut judicare* jurisdiction, requiring a state party "in the territory of which the alleged offender is present... if it does not extradite... to submit the case to its competent authorities for the purpose of prosecution".⁵⁹³ This jurisdiction has been referred to as "the jurisdiction to establish a territorial jurisdiction over persons for extraterritorial events,"⁵⁹⁴ and requires the offender to be present in the territory of the arresting state.⁵⁹⁵ *Aut dedere aut judicare* jurisdiction has developed from treaty law, but is expanding to be acceptable in customary law for international crimes, the prohibition of which is considered a norm *jus cogens* such as torture.⁵⁹⁶

⁵⁹⁰ This is certainly an issue that would have to be further examined before a convention could be enacted, with regards to the primacy of the convention over these other forms of international agreements.

⁵⁹¹ O'Brien, *supra* note 561, p. 69.

⁵⁹² *Lotus Case*, *supra* note 522, pp. 18-19.

⁵⁹³ Article 7 Prosecution of offenders.

⁵⁹⁴ *Arrest Warrant Case*, *supra* note 524, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 42.

⁵⁹⁵ *Ibid.*, para. 57.

⁵⁹⁶ M.N. Shaw, *International Law*, 6th ed., (Cambridge University Press, Cambridge 2008), p. 673. *See also* the current application before the International Court of Justice (ICJ) Questions relating to the Obligation to

“The duty to prosecute under those treaties which contain the *aut dedere aut prosequi* provisions opens the door to a jurisdiction based on the heinous nature of the crime rather than on links of territoriality or nationality (whether as perpetrator or victim). The 1949 Geneva Conventions lend support to this possibility, and are widely regarded as today reflecting customary international law.”⁵⁹⁷ Thus it is important to include such a provision requiring state parties to prosecute or extradite in the Draft Convention.

However, the situation of PSOs can be differentiated from the ordinary, in which a state’s representatives (and the offender) would be wholly within the state’s own territory. This is not the case when personnel are serving in a UN mission. Consequently, such a provision leaves another loophole for states, requiring a state to initiate prosecutorial proceedings only if the alleged perpetrator is within that state’s territory. Despite the Group recognising criminal proceedings held within the territory in which the conduct occurred to be significantly advantageous, due to the ease of access to evidence and witnesses, there is no equal requirement that states prosecute their own nationals even if they are not located in that state’s territory- which personnel are not unless they are repatriated.

Despite the recommendation of on-site courts-martial in the Zeid Report,⁵⁹⁸ the Group has failed to build this into the Draft Convention, even though it is likely that some of those personnel considered within the scope of this Draft Convention may be subject to their national military jurisdiction. Should the convention be expanded to cover military personnel, those personnel would definitely be included. Courts-martial are convenient as they are able to be convened anywhere in the world.⁵⁹⁹ A requirement to prosecute could even be tempered by the condition that states only be obligated to

Prosecute or Extradite (*Belgium v. Senegal*), application submitted 16 February 2009, in which Belgium alleges a breach by Senegal of that state’s obligations to prosecute or extradite, under the Convention against Torture and customary international law.

⁵⁹⁷ *Arrest Warrant Case*, *supra* note 524, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, *supra* note 524, para. 46; J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, (Cambridge University Press, Cambridge 2005), pp. 607-611; G. Werle, *Principles of International Criminal Law*, 2nd ed., (T.M.C. Asser Press, The Hague 2009), pp. 68-70.

⁵⁹⁸ Zeid Report, *supra* note 427, para. 36.

⁵⁹⁹ J. Blackett, *Rant on the Court Martial and Service Law*, 3rd ed., (Oxford University Press, Oxford 2009), Chapter 5 The Court Martial, pp. 77- 132.

prosecute in the host state using a temporary on-site court-martial or other legal body if the host state is unable or unwilling to prosecute.

Article 8 renders all crimes covered by the Draft Convention as extraditable offences between state parties, and obliges state parties to “include such offences as extraditable offences in every extradition treaty to be subsequently concluded by them”.⁶⁰⁰ This is in keeping with the imposition of *aut dedere aut judicare* jurisdiction in the Draft Convention. It is stated that, “if necessary, the crimes shall be treated, for the purposes of extradition between States parties, as if they had been committed not only in the place in which they occurred but also in the territory of the States parties which have established their jurisdiction in accordance with article 4”.⁶⁰¹ Again, this enacts *aut dedere aut judicare* jurisdiction over the crimes, and is a straight-forward provision similar to provisions in other treaties.⁶⁰²

3.3.1.6. Conduct which is not a crime under the law of the host State or the State party

Article 9 of the Draft Convention states that there is no obligation on state parties imposed by Articles 6, 7 and 8

“to take measures where the conduct constituting the alleged crime:

- (a) Does not constitute a crime under the law of the State where the conduct occurred; or
- (b) Would not, if it had taken place in that State party’s territory, constitute a crime under its national law.”⁶⁰³

Article 9(a) applies dual criminality, so a state is not obliged to take action when the conduct does not constitute a crime in the territory where the conduct occurred (the host state).⁶⁰⁴ This is contrary

⁶⁰⁰ Article 8(1) Extradition of alleged offenders.

⁶⁰¹ Article 8(4).

⁶⁰² *E.g.* International Convention for the Suppression of Acts of Nuclear Terrorism, GA RES 59/290, 13 April 2005, entered into force 7 July 2007, and the Convention on the Safety of United Nations and Associated Personnel (*supra* note 559), both of which contain provisions on which Article 8 of this Draft Convention was based.

⁶⁰³ Article 9 Conduct which is not a crime under the law of the host State or the State party.

⁶⁰⁴ Article 5 also states that there is no ‘obligation on a State party to establish jurisdiction over conduct which does not constitute a crime under the law of the State where the conduct occurred.’ This is seemingly contradictory to the obligation under Article 4 to enact nationality jurisdiction, the principle of which gives a state jurisdiction over its own nationals based on that state’s allocated jurisdictional laws, and *not* the jurisdiction

to the purpose of requiring states to enact extra-territorial nationality jurisdiction over their peacekeeping personnel. States are required under the Draft Convention to establish nationality jurisdiction, enabling them to take legal action to ensure criminal accountability for conduct committed by their nationals in the host state. Yet the Draft Convention then contradicts itself by providing a loophole for states to not enforce this jurisdiction when the conduct was not a crime in the host state, which it may not be, given the lack of legal infrastructure that tends to exist in post-conflict societies.

Article 9(b) is consistent with the principle of dual criminality, and in this regard compliments Article 9(a). Nonetheless, the aim of the Draft Convention is to require state parties to criminalise and prosecute the crimes covered by the Draft Convention. Consequently there should be no need for such a provision as Article 9(b).⁶⁰⁵ Dual criminality has long been used in extradition agreements, but the current trend is moving away from the requirement, with the view that it is an impediment to efficient and effective mutual legal assistance and extradition.⁶⁰⁶ This rejection of the need for dual criminality can particularly be seen in the European Union (EU), in relation to the crimes of the Rome Statute of the ICC (war crimes, crimes against humanity, and genocide). The EU has enacted the European Arrest Warrant (EAW), which came into force in 2004.⁶⁰⁷ The aim of the EAW is to enable a more expeditious and streamlined process in respect of extradition procedures between member

of the state where the conduct occurred. In fact, whether the conduct in question under this Draft Convention is legal in the territory where it occurred should be irrelevant. The aim of the Draft Convention is for states to criminalise such behaviour.

⁶⁰⁵ O'Brien, *supra* note 561, p. 71.

⁶⁰⁶ W.V. Dunlap, 'Dual Criminality in Penal Transfer Treaties' (1988-1989) 29 *Virginia Journal of International Law* 813-858; J.O. Hafen, 'International Extradition: Issues Arising Under the Dual Criminality Requirement' (1992) *Brigham Young University Law Review* 191-230; T.F. Muther Jr, 'The Extradition of International Criminals: A Changing Perspective' (1995-1996) 24 *Denver Journal of International Law and Policy* 221-228, pp. 224-6; G. Griffith and C. Harris, 'Recent Developments in the Law of Extradition' (2005) 6 *Melbourne Journal of International Law* 33-54, pp. 37-42; R. Cryer, et al., *An Introduction to International Criminal Law and Procedure*, (Cambridge University Press, Cambridge 2007), pp. 74-75. Others argue that dual criminality is an essential element of extradition in order to ensure protection of human rights; R.J. Currie, 'Human Rights and International Mutual Legal Assistance: Resolving the Tension' (2000) 11 *Criminal Law Forum* 143-181, p. 160. This argument can be countered, *e.g.*, with regards to European states as they must comply with the European Convention on Human Rights; *see* C. Van den Wyngaert, 'Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?' (1990) 39 *International and Comparative Law Quarterly* 757-779.

⁶⁰⁷ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), Official Journal of the European Communities, L 190/1 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0584:EN:NOT>> (accessed on 28 January 2009) (hereinafter, EAW).

states.⁶⁰⁸ The EAW still contains reference to dual criminality, but only as an optional ground for non-execution of the EAW.⁶⁰⁹ However the aim is to discourage the use of dual criminality as a ground for non-execution of an extradition request, with member states recognising the equality and validity of other member states' law, as part of general EU harmonisation. Of course it is important to recognise the special circumstances of the EU, as a regional organisation with shared values⁶¹⁰ - a situation which could not apply with regard to all states on a global scale.

The move away from the dual criminality requirement is surfacing in more recent extradition agreements. Instead of a general agreement to extradite, the agreements specifically list crimes that will be extraditable between the states party to the agreement. The EAW is an example of this, detailing the scope of the EAW to cover "acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months", and an extensive list of crimes that give rise to surrender pursuant to an EAW. Such crimes include trafficking in human beings, sexual exploitation of children, rape, and crimes within the jurisdiction of the ICC.⁶¹¹ In fact, the EU has found that dual criminality has not been a major restraint on mutual legal assistance carried out under the EAW, as member states either already have fairly similar legislation or have enacted legislation to include the serious crimes covered by the EAW.⁶¹²

Dual criminality should not impede exercise of nationality jurisdiction with regards to crimes committed by peacekeeping personnel. Were the Draft Convention to list specific crimes to be agreed as extradition crimes (while not discounting a general provision for unlisted crimes), there would be no need for the application of dual criminality as a ground for non-execution of jurisdiction under the convention. The list would enable state parties to undertake legislative changes in the

⁶⁰⁸ EAW, Preamble, para. 1.

⁶⁰⁹ EAW, Article 4(1); G.J. Mann, 'The European Arrest Warrant: A Short-Lived Mechanism for Extradition?' (2006-2007) 34 *Syracuse Journal of International Law & Commerce* 715-740, p. 719.

⁶¹⁰ P. Craig and G. De Burca, *EU Law: Texts, Cases and Materials*, 3rd ed., (Oxford University Press, Oxford 2002).

⁶¹¹ L. Vierucci, 'The European Arrest Warrant An Additional Tool for Prosecuting ICC Crimes' (2004) 2 (1) *Journal of International Criminal Justice* 275-284.

⁶¹² Final Report on the first evaluation exercise- mutual legal assistance in criminal matters, (2001/C 216/02), Official Journal of the European Communities, C 216, 01/08/2001, P. 0014-0026, 32001X0801(02) (hereinafter 'Final Report on mutual legal assistance').

same vein as those taken by state parties to the Rome Statute. State parties have adopted, or are in the process of adopting, legislation that contains identical or very similar provisions to the Rome Statute itself, which avoids the issue of dual criminality ever arising, and demonstrates a willingness of states to follow their international treaty obligations and criminalise specific behaviour.⁶¹³

3.3.1.7. Exercise of jurisdiction in the territory of another State party

No state party of the Draft Convention is entitled to exercise jurisdiction and the “performance of functions [in the territory of another state party] which are exclusively reserved for the authorities of that other State party by its national law”.⁶¹⁴ Again, this text is phrased from the International Convention for the Suppression of Acts of Nuclear Terrorism, and the Group determines that it “presumably refers to activities such as the exercise of police powers”.⁶¹⁵ This provision emphasises the concept of mutual legal assistance rather than the outright exercise of jurisdiction and other functions in the territory of another state party without cooperation, assistance or agreement between the states. However, the special circumstances of a PSO must be taken into account, in that it involves personnel stationed outside the territory of their sending state, which differentiates the situation from that of nuclear terrorism. States are permitted to exercise jurisdiction with respect to disciplining their own military personnel. Personnel designated by the Force Commander or Special Representative of the Secretary General will police the mission premises and the areas where personnel are deployed, and military police have the power of arrest of military members of a mission.⁶¹⁶ Therefore, Article 21 should be rephrased to take into account the fact that a SOFA expressly grants a state party entitlement to exercise jurisdiction and perform functions in the territory of the host state which are normally reserved for the authorities of the host state.

⁶¹³ See e.g. the United Kingdom International Criminal Court Act 2001; or the Australian *International Criminal Court Act* (Cth) 2002.

⁶¹⁴ Article 21 Exercise of jurisdiction in the territory of another State party.

⁶¹⁵ Article 21, fn 68.

⁶¹⁶ Model Status of Forces Agreement (SOFA), A/45/594, Annex, paras. 40 and 41.

3.4. Immunity

There are many different categories of peacekeeping personnel, and they are subject to different disciplinary authorities, immunities and jurisdictions. The different classifications of jurisdiction and immunity applicable to peacekeeping personnel must be kept in mind throughout the consideration of actions to ensure criminal accountability of peacekeeping personnel.⁶¹⁷ There are two different types of immunities: functional immunity (or immunity *ratione materiae*) and absolute immunity (or immunity *ratione personae*).⁶¹⁸ Functional immunity is granted by the Convention on the Privileges and Immunities of the United Nations (General Convention), and can be waived by or on behalf of the Secretary-General.⁶¹⁹ Functional immunity provides immunity from criminal proceedings in the host state in respect of words spoken or written, and all acts performed in an official capacity or in the course of the performance of work. Thus any act which is *ultra vires* official capacity or purposes of work will not be subject to immunity.⁶²⁰ Such immunity is applied to UN staff, experts on mission and officials. Functional immunity continues to subsist even after the termination of employment with the organisation, and may still be invoked.⁶²¹ Under the SOFA, functional immunity only applies in the area of operations/territory of the host state, unless specifically provided otherwise.⁶²² Hence

⁶¹⁷ These are set out in Appendix 2.

⁶¹⁸ R. Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, (Oxford University Press, Oxford 2008), Chapter 3 Functional Immunity pp. 103 ff; Chapter 4 Personal Immunity pp. 158 ff.

⁶¹⁹ Convention on the Privileges and Immunities of the United Nations, 1 UNTS 15, entered into force 17 September 1946, Art. V s. 18, Art. VI and Art. VII s. 27. *See also* Model SOFA, A/45/594, para. 46. Immunity for international organizations stems from such agreements and treaties; H. Fox, *The Law of State Immunity*, 2nd ed., (Oxford University Press, Oxford 2008), p. 725. The International Court of Justice has held that any finding of the Secretary-General as to the immunity of a UN agent “can only be set aside by the most compelling reasons and is thus to be given the greatest weight by national courts”; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion of 29 April 1999, ICJ Reports 1999, p. 87, para. 61.

⁶²⁰ Fox, *ibid.*, p. 667.

⁶²¹ Report of the Ad Hoc Committee on criminal accountability of United Nations officials and experts on mission, Second session (7-9 and 11 April 2008), A/63/54, para. 32. (Hereinafter ‘Second session report of the Ad Hoc Committee’.)

⁶²² Model SOFA, para. 2.

some categories of personnel such as UN Volunteers and consultants do not enjoy functional immunity in their home state.⁶²³

The other category of immunity is absolute immunity. Absolute immunity from host state jurisdiction is granted under the General Convention to only very senior UN officials (in the form of full diplomatic immunity),⁶²⁴ and through the SOFA to members of national contingents.⁶²⁵ If immunity is waived, criminal jurisdiction may be exercised by the host state, sending state, or potentially by a third state. However, the sending state can only exercise jurisdiction if its laws allow for extra-territorial jurisdiction over its nationals. Such extra-territorial jurisdiction could be applicable to all nationals, or specific to certain categories of personnel such as military personnel or police officers.⁶²⁶ Third state jurisdiction only arises in the case of international crimes over which a third state exercises universal jurisdiction, or applies the principle of extradite or prosecute.⁶²⁷

Waiver of immunity is not invoked at the outset of an allegation investigation, with the UN electing to cooperate voluntarily in relation to the investigation. Documents are “provided on a voluntary basis without prejudice to the possible invocation of immunity”.⁶²⁸ When considering a waiver of immunity, the UN takes into account the interests of the UN and the impact of a waiver or lack thereof on the administration of justice.⁶²⁹

The Draft Convention also takes immunities into consideration. Under Article 18, state parties are not obliged to “take any measure which is inconsistent with any immunity of a [UN] official or expert on mission unless the competent organ of the [UN] has waived such immunity, either generally or in relation to specific measures to be taken by that State party”. However, in the instance where

⁶²³ Working paper on the accountability of international personnel taking part in peace support operations submitted by Françoise Hampson, (7 July 2005), E/CN.4/Sub.2/2005/42, para. 42. (Hereinafter ‘Working paper’.)

⁶²⁴ General Convention, Art. V, s. 19. On diplomatic immunity, *see* Fox, *supra* note 619, pp. 700-716.

⁶²⁵ Model SOFA, A/45/594, para. 27. Fox, *supra* note 619, pp. 717-718.

⁶²⁶ *E.g.* the Swedish Penal Code grants jurisdiction to Swedish courts “if the crime was committed in the course of duty outside the Realm by a person employed in a foreign contingent of the Swedish armed forces”; Ds 1999:36, section 3(3). For further discussion on extra-territorial jurisdiction in national laws, *see* Chapter 4 for analysis of Australian and US law.

⁶²⁷ Working paper, *supra* note 623, para. 46.

⁶²⁸ Second session report of the Ad Hoc Committee, *supra* note 621, para. 30.

⁶²⁹ *Ibid.*, para. 31.

immunity exists in relation to specific measures to be taken by the state party, it is the state party that must seek a waiver of such immunity.⁶³⁰

As regards UN officials and experts on mission, it is up to the UN to waive their immunity. Given the fact that the UN would not be a party to this convention, there is no reason to obligate the UN to waive immunity within this convention. However, a stronger provision would declare that immunity shall not exist for any peacekeeping personnel for crimes committed that are dealt with under the Draft Convention.⁶³¹ Officials (with the exception of very senior officials) and experts on mission are all subject to functional immunity.⁶³² Very senior officials such as the Head of Mission (Special Representative of the Secretary-General) are protected by absolute immunity. Given that functional immunity only covers acts committed in an official capacity,⁶³³ it can be argued that behaviour such as sexual exploitation does not fall within the official duties of an official or expert on mission.⁶³⁴ As noted above, along with very senior officials, military personnel are granted absolute immunity.⁶³⁵ Thus, this provision should state that absolute immunity does not include immunity for criminal acts to ensure states cannot argue the application of immunity as a reason for non-prosecution of national military personnel or very senior officials.⁶³⁶

This section has evinced that immunity is a bar to accountability; an obstacle that must be overcome en route to prosecution of offenders. The question of immunity is not one that is not raised in ordinary domestic criminal law, and is specific to circumstances involving international law. In this

⁶³⁰ Convention on the Privileges and Immunities of the United Nations, Article V, Section 20; Article VI, Section 23.

⁶³¹ O'Brien, *supra* note 561, p. 72.

⁶³² *Ibid.*, Article V, Sections 18, and 22.

⁶³³ UN Charter, Article 105; Convention on the Privileges and Immunities of the UN, Article V, Sections 18 and 20, and Article VI, Sections 22 and 23.

⁶³⁴ If this were the case, it would give rise to 'bizarre results' (that is, the allowance of officials to commit international crimes); *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*; *Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* (On Appeal from a Divisional Court of the Queen's Bench Division) [1999] UKHL 17 (*Pinochet III*), per Lord Browne-Wilkinson.

⁶³⁵ Absolute immunity for senior officials is granted by the Convention on the Privileges and Immunities of the UN, Sections 18 and 19; and for military personnel by the SOFA and MoU.

⁶³⁶ This would be along the lines of the argument of Lord Hope in *Pinochet III*, *supra* note 634, who found that, for a category of personnel to be excluded from general immunity for a crime, a convention must have a provision either expressly or impliedly rejecting immunity for the particular crimes within that instrument.

case, it is relevant to all categories of mission personnel, but the applicability and removability is complex. However, this section has demonstrated how such immunity can be surmounted. Once this has been achieved, accountability is the next step, which will be examined in the following section.

Immunity will also be examined in Chapter 5 with regard to the International Criminal Court.⁶³⁷ That examination will support the view taken here, that immunity is a surmountable obstacle to accountability.

3.5. Accountability

The aim of this thesis is to examine how to ensure criminal accountability for peacekeeping personnel for the commission of gender-based crimes such as sexual exploitation. The previous sections in this chapter have examined several issues that are a pre-cursor to accountability-jurisdiction and immunity. UN instruments relevant specifically to accountability must be examined: those which deal with the enforcement of standards of conduct and discipline (the MoU), and require states to have the ability to ensure accountability and to take action on this (the MoU and the Draft Convention).

The MoU authorises that discipline and good order of national contingent members is the responsibility of the national commander.⁶³⁸ The sending state must secure the authority of the commander to take reasonable measures to maintain discipline and good order of the national contingent members in compliance with standards of conduct, and rules and regulations. A national commander must inform the Force Commander of any serious matters relating to discipline and good order including disciplinary action taken for violations of the standards of conduct or mission rules and regulations, or for failure to respect the local laws and regulations.

The sending state is obliged to train the national commander pre-deployment to enable the national commander to fully discharge their responsibilities in maintaining discipline and good order. The UN

⁶³⁷ See *infra* Chapter 5.5 Immunities.

⁶³⁸ Model MoU Article 7 *ter* Discipline.

is also required to organise training on UN standards of conduct, mission rules and regulations, and the local laws and regulations for commanders upon their arrival in-mission.

3.5.1. Accountability under the Draft Convention

Steps to ensuring accountability are addressed in several provisions of the Draft Convention. Article 3 deems an official or expert on mission to have committed a crime “if that person intentionally engages in conduct which constitutes one of the serious crimes set out in paragraph 2 of the present article while serving on a [UN] peacekeeping operation in a host State”.⁶³⁹

The Draft Convention contains a principle Article 3(2), and an alternative Article 3(2), which cover the crimes dealt with under the Draft Convention. The principle Article 3(2) covers only murder, wilfully causing serious injury to body or health, rape and other acts of sexual violence, and sexual offences involving children. The phrase “other acts of sexual violence” is broad, and thus enables an expansive interpretation that includes SEA. However, there is a need to make the list of crimes covered by the convention non-exhaustive, or at least to include more than on this short list. For example, torture is not included, nor are crimes such as trafficking, theft, fraud, money laundering, weapons smuggling, illegal weapons purchasing, drug production and trafficking, or involvement in organised crime.⁶⁴⁰ It has been recognised by the UN that “significant forms of misconduct by uniformed peacekeeping personnel are harassment, assault, excessive use of force, unlawful discharge of weapon and traffic violations”, and by staff in missions “fraud... theft, harassment (including sexual), abuse of authority, mismanagement, misuse of the Organization’s assets, and traffic-related violations”.⁶⁴¹ Such crimes should also be covered by the convention. The report offers no explanation as to the reasoning behind the omission of such crimes or the choice of crimes listed.

⁶³⁹ Article 3 Crimes committed during United Nations peacekeeping operations.

⁶⁴⁰ There have been instances of serious misconduct other than gender-based crimes, *e.g.*, it was alleged that Pakistani peacekeeping personnel traded gold mined illegally by militia for, and re-armed the disarmed militia with, weapons. M. Plaut, ‘UN troops ‘traded gold for guns’, *BBC News*, 23 May 2007, <http://news.bbc.co.uk/2/hi/africa/6681457.stm>.

⁶⁴¹ Comprehensive report of conduct and discipline, *supra* note 451, para. 11.

Grounds of criminal responsibility for these crimes comprise intentional individual commission and attempt. Further, Article (3)(2)(f) covers “participation in any capacity, such as an accomplice, assistant or instigator”. This is so drafted so as to “apply, for example, to the conduct of senior persons in authority, for example, managers, who destroy evidence”.⁶⁴² The provision is broad, and unusual in its use of the term ‘instigator’. It is not clear what it meant by this term; perhaps it is designed to encompass grounds of criminal responsibility such as ordering or soliciting or, most likely, incitement. The provision does not specifically mention the concept of superior or command responsibility. Superior or command responsibility would be an important form of criminal responsibility to include, given the hierarchical structure of a PSO,⁶⁴³ covering situations where superiors or commanders knew or should have known such crimes were being committed but failed to stop such actions or take steps to punish the perpetrators.⁶⁴⁴ Nor are the grounds of responsibility of conspiracy, joint criminal enterprise, ordering, soliciting, or inducing mentioned. While it is true that such grounds can be encompassed in the broad phrase “participation in any capacity”, a more extensive list would be of assistance to state parties when ensuring their jurisdiction over peacekeeping personnel is comprehensive. For the same reason, some definitions may be useful for the terms used, as there are different grounds of criminal responsibility found in states’ national laws. For example, some states include negligence as a ground of criminal responsibility while others do not.⁶⁴⁵

⁶⁴² Article 3(2)(f), fn 23.

⁶⁴³ There are strategic, operational and tactical layers of the PSO hierarchy. For example, at the top of the military command structure is the Force Commander, who is in turn under the authority of the political head of the mission, the Special Representative of the Secretary-General. *United Nations Peacekeeping Operations Principles and Guidelines* (New York: Peacekeeping Best Practices Section, Division of Policy, Evaluation and Training, Department of Peacekeeping Operations, United Nations, January 2008), pp. 66-69, available at http://pbpu.unlb.org/pbps/Library/Capstone_Doctrine_ENG.pdf (hereinafter ‘DPKO Principles and Guidelines’). See further, Chapter 5.

⁶⁴⁴ See Article 28 of the Rome Statute. B.I. Bonafé, ‘Finding a proper role for command responsibility’ (2007) 5 (3) *Journal of International Criminal Justice* 599-618; C. Meloni, ‘Command responsibility: mode of liability for the crimes of subordinates or separate offence of the superior?’ (2007) 5 (3) *Journal of International Criminal Justice* 619-637. See further, Chapter 5.

⁶⁴⁵ For example, the Australian *Criminal Code Act* (Cth) 1995 includes negligence as a grounds of criminal responsibility (Chapter 2- General principles of criminal responsibility, s. 5.5), but the Rome Statute does not (Articles 25, 30, 31, and 32).

The crimes covered by the alternate Article 3(2) are “crimes of intentional violence against the person and sexual offences punishable under the national law of that State party by imprisonment or other deprivation of liberty for a maximum period of at least [one/two] year(s), or by a more severe penalty”.⁶⁴⁶ More crimes are certainly encompassed by the alternate article. The phrasing of ‘sexual offences’ is far broader than in the principle Article 3(2). ‘Sexual offences’ will quite easily encompass crimes such as sexual exploitation. Nonetheless, the catch is that the crimes must be punishable by at least one year’s imprisonment. For example, states that have not criminalised sexual exploitation but have criminalised patronising a prostitute may not see one year’s imprisonment as an appropriate penalty, instead regarding either fines or a lesser period of maximum imprisonment as adequate punishment.⁶⁴⁷ Thus, prostitution-related activities may not be subsumed by the obligations of the Draft Convention. In addition, again, the limitations will exclude many serious crimes such as theft, fraud, money laundering, involvement in organised crime, weapons smuggling, illegal weapons purchasing, and drug production and trafficking. The alternate Article 3(2) also covers attempt, and “participation in any capacity, such as an accomplice, assistant or instigator”.

A more effective crimes provision would list specific crimes that need to be covered by states’ jurisdiction over peacekeeping personnel, followed by a catch-all statement to allow the inclusion of other crimes not mentioned in the list. As it stands, the Draft Convention does not oblige states to criminalise a large range of specific crimes. Obliging a state to establish jurisdiction over “crimes of intentional violence against the person and sexual offences punishable... by imprisonment... for a maximum period of at least one year” does not clarify the crimes a state should criminalise. In fact, a state could criminalise rape and sexual assault, claiming that it had satisfied its obligations under the treaty by establishing jurisdiction over ‘rape and acts of sexual violence’ or ‘sexual offences’. With no definition of ‘sexual violence’ or ‘sexual offences’ provided, the Draft Convention is lacking in strong

⁶⁴⁶ Article 3(2)(a).

⁶⁴⁷ That being said, under the US UCMJ, it is clear that the US government has taken the crime of patronising a prostitute seriously, as it is subject to a maximum penalty of “dishonourable discharge, forfeiture of all pay and allowances, and confinement for one year”; Manual for Courts-Martial United States 2005 Edition, ¶ 97, Article 134- (Pandering and prostitution), subparagraph (e)(1).

enforceability and provides a loophole for states to argue they have complied with their convention responsibilities without having comprehensive legislative provisions.⁶⁴⁸ Listed crimes need to be more precise, yet not exhaustive, in the vein of the Rome Statute. For example, 'sexual offences' could be defined so as to include, non-exhaustively, crimes such as sexual exploitation, prostitution-related activities, enforced prostitution, sexual slavery, rape, forced pregnancy, and enforced sterilisation. The definition could then follow the example of the Rome Statute and state "or any other form of sexual offences of comparable gravity".⁶⁴⁹ Following wording of the Rome Statute would be more likely to appeal to states, given the issues raised during the negotiation of text of the 'gender-based crimes', particularly regarding the need to exclude any reference to abortion.⁶⁵⁰ Such a definition would require states to criminalise certain specified behaviour, but also allow for a state to criminalise other behaviour that may be equally categorised as a sexual offence. The comprehensiveness of the Rome Statute's gender-based crimes is discussed in Chapter 5, although it is recognised that the Rome Statute would benefit from an expression provision proscribing sexual exploitation.

In addition to substantive law definitions, under Article 5 the Draft Convention specifically states that there is no "obligation on a State party to establish jurisdiction over conduct which does not constitute a crime under the law of the State where the conduct occurred".⁶⁵¹ This article refers to the possibility of incongruous criminal jurisdiction, and applies the principle of dual criminality which

⁶⁴⁸ Yet if a state remains unable to prosecute for a specific offence, this may leave open the door for the ICC to step in on the grounds of the state's inability (or unwillingness) to prosecute; Art. 17 Rome Statute; S.A. Williams and W.A. Schabas, 'Article 17 Issues of Admissibility', in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., (C.H. Beck, Hart, Nomos, Muenchen, Oxford, Baden-Baden 2008), 605-625.

⁶⁴⁹ See Rome Statute, Articles 7(1)(g), 8(2)(b)(xiv), and 8(2)(e)(vi).

⁶⁵⁰ C. Steains, 'Gender Issues', in Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, (Kluwer Law International, The Hague 1999), 357-390, pp. 365-69; K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, (Cambridge University Press, Cambridge 2002), p. 330; M. Cottier, 'Article 8 War crimes para. 2(b)(xxii)', in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., (C.H. Beck, Hart, Nomos, Muenchen, Oxford, Baden-Baden 2008), , pp. 449-50.

⁶⁵¹ Article 5 Conduct which is not a crime under the law of the host State.

is often found in extradition treaties.⁶⁵² However, it is also somewhat at odds with the jurisdictional obligations under the Draft Convention, in that it allows for a state *not* to enact nationality jurisdiction if the conduct is not a crime in the state in whose territory the conduct occurred. This is contradictory to the obligation to enact nationality jurisdiction, the principle of which gives a state jurisdiction over its own nationals based on that state's allocated jurisdictional laws, and *not* the jurisdiction of the state where the conduct occurred. In fact, whether the conduct in question under this Draft Convention is legal in the territory where it occurred should be irrelevant. The aim of the Draft Convention is for states to criminalise such behaviour. This provision would create particular difficulties for enforcing criminal accountability over peacekeeping personnel serving in a mission located in a country with little or no criminal system infrastructure including a lack of existing laws over criminal behaviour. It would essentially be a means for states to evade enforcement of criminal accountability in these specific circumstances.

3.5.2. Ensuring managerial/superior and command responsibility

One problem raised by the Zeid Report was that there is a perception that “neither the [UN] nor its civilian managers and military commanders are held to account to make good-faith efforts to address the problem of sexual exploitation and abuse in peacekeeping operations”.⁶⁵³ It was recommended that managers and commanders set an example and raise awareness of the prohibition of SEA; that a database be developed so managerial personnel are able to track SEA allegations; improvement of mission living conditions and mission-specific measures such as curfews and off-limits areas; the tasking of managers and commanders with the implementation of programmes and policies of the UN for the prevention of SEA; and the assessment of managers and commanders on how they perform these duties.⁶⁵⁴

⁶⁵² See e.g. the UN Model Treaty on Extradition, GA RES 45/116, amended by GA RES 52/88, Article 4(e); EAW, *supra* note 607. For further discussion on dual criminality as it applies to this Draft Convention, see discussion *supra* Conduct which is not a crime under the law of the host State or the State party.

⁶⁵³ Zeid Report, *supra* note 427, para. 37.

⁶⁵⁴ *Ibid.*, paras. 62-65.

The CDU has begun working with the SEA Task Force on managerial compliance, including a compliance-based approach and a risk assessment approach. The unit is also examining changing performance evaluations for civilians, through human resources. Such changes will probably take time to develop and implement within the DPKO and especially the UN as a whole, but it will be anticipated that such approaches will ensure managerial responsibility for SEA-related issues. It should also be anticipated that such approaches will be applicable to the highest echelons of management and command, ensuring that those as far up as the Force Commander and the Head of Mission are aware of the prohibitions, and of their own roles in preventing and punishing misconduct.

In relation to command responsibility, under the new Article 7 *sexiens* of the Model MoU, sending state governments are obligated to take action if national contingent commanders fail to cooperate with a UN investigation, fail to exercise effective command and control, or neglect to immediately report to appropriate authorities or take action in respect of allegations of misconduct reported to the commander.⁶⁵⁵ It is the contingent commanders' "obligation to maintain the discipline and good order of the contingent".⁶⁵⁶ The commander's fulfilment of such requirements shall be evaluated in the commander's performance appraisal.⁶⁵⁷ There appears to have been some success with this policy already, with the CDU reporting that contingent commanders have been repatriated for failures to ensure prevention of SEA.

This section has shown how the UN can assist with ensuring accountability for perpetrators of SEA. These procedures will function in conjunction with states, as will be discussed in Chapter 4. Yet one important aspect of combining the processes of investigation and prosecution of the UN as an international organisation, and states is how such mutual legal assistance will be coordinated. The subsequent section will review problems and solutions of cooperation and mutual legal assistance between the UN and states in misconduct investigations.

⁶⁵⁵ Model MoU, Article 7(2) *sexiens*.

⁶⁵⁶ Article 7(4) *sexiens*.

⁶⁵⁷ Article 7(2) *sexiens*.

3.6. Cooperation/ Mutual Legal Assistance

3.6.1. Lack of cooperation between the UN and states in misconduct investigations

The lack of cooperation between the UN investigative bodies, and the UN and states in misconduct investigations was one of the most significant criticisms from the Zeid Report, with recommendations made for the establishment of a more professional investigative mechanism, and that sending states participate in investigations.⁶⁵⁸ Currently the mandate for UN investigations into misconduct lies with the Office of Internal Oversight Services (OIOS),⁶⁵⁹ as SEA are termed a Category I offence.⁶⁶⁰ Offences are divided into two categories: Category I Serious offences, and Category II Routine offences. Category I offences include SEA, and serious criminal activity.⁶⁶¹ Investigations into allegations against civilian personnel are conducted by the OIOS special investigation unit; against military personnel, by the military police; and against CivPol, by CivPol investigators. Since changes were made to procedural policies in 2005, the OIOS and the CDU have developed a relationship of cooperation.⁶⁶² Many procedural aspects are still evolving, such as information sharing arrangements, and the application of the new MoU provisions. Standard operating procedures for both Headquarters and mission follow-up procedures are being developed. Changes already made have resulted in increased understanding and collaboration between the OIOS and the CDU, both at mission and Headquarters levels. "Reports from the missions indicate that the improved dialogue has resulted in substantial improvement in procedures, which has translated into a marked increase in investigation reports and a substantial decrease in the response time of the Investigations Division in addressing allegations transmitted to them."⁶⁶³ Increased sharing of information has enabled mission

⁶⁵⁸ Zeid Report, *supra* note 427, paras. 28-36.

⁶⁵⁹ OIOS <http://www.un.org/depts/oios/>.

⁶⁶⁰ Report of the Office of Internal Oversight Services on strengthening the investigation functions in the United Nations, A/RES/59/287, 21 April 2005, para. 6.

⁶⁶¹ OIOS Investigations Manual, March 2009, http://www.un.org/Depts/oios/pages/id_manual_mar2009.pdf, p. 9.

⁶⁶² Overview of financing, *supra* note 468, para. 72.

⁶⁶³ *Ibid.*, para. 73.

CDUs to “better assess the level and gravity of allegations, and to better advise the heads of mission accordingly”.⁶⁶⁴

Where appropriate, the CDU, in conjunction with the Office of Legal Affairs, informs the Permanent Mission of the sending state concerned, with the aim of coordinating the investigation of the allegation. To date, the UN has found that this process has increased cooperation and advisory activities between all parties involved in investigations.⁶⁶⁵ This cooperation continues even at the conclusion of an investigation. Even if an investigation is conducted by the military police or police investigators, Headquarters CDU will inform the Permanent Mission of the sending state of the outcome of the investigation. CDU, on behalf of the DPKO/DFS, where appropriate, will advise the PSO to repatriate the individual on disciplinary grounds.⁶⁶⁶ All investigation outcomes are recorded in a database.⁶⁶⁷

Cooperation between the UN and states is dealt with in the new MoU provisions. Investigations relating to misconduct by military personnel are dealt with in Article 7 quater, Investigations. The government of a troop contributing country “has the primary responsibility for investigating any acts of misconduct or serious misconduct committed by a member of its national contingent”.⁶⁶⁸ A government is required to inform the UN when it has grounds to believe that a member of its national contingent has committed serious misconduct, and to forward the case to its appropriate national authorities for the purposes of investigation.⁶⁶⁹ Should it be the UN who has the grounds, the UN must inform the sending state’s government (it may be assumed through the Permanent Mission, although this is not stated). The UN may initiate a preliminary investigation until the government begins its own investigation, for the purposes of preserving evidence and conducting fact-finding proceedings. Such an investigation will be conducted in accordance with UN procedure, by the appropriate UN investigative office, including the OIOS. The investigative team must include a

⁶⁶⁴ *Ibid.*

⁶⁶⁵ *Ibid.*, para. 26.

⁶⁶⁶ *Ibid.*, para. 30.

⁶⁶⁷ *See supra* Recording and reporting of misconduct cases and data.

⁶⁶⁸ Article 7 quater.

⁶⁶⁹ Article 7(1) quater.

representative of the government. At the conclusion of the investigation, the UN is to provide the sending state with a full report.⁶⁷⁰

Article 7(3)(a) and (b) and quater require cooperation between the UN and the sending state government. The UN must provide the government with all available materials, and the government is obliged to instruct the commander of its national contingent to cooperate and share any documentation and information with the UN. Members of the national contingent must also cooperate. Article 7(4) quater details further the steps to be taken by the UN, and cooperation between the UN and the sending state, and the UN and the host state. The UN is to provide logistic and administrative support for any national investigation officers whilst in the host state, and financial support where their presence is required by the UN.⁶⁷¹ National investigations officers are to lead any investigation and again, the sharing of all materials and mutual assistance is emphasised.⁶⁷²

In addition to the MoU provisions, under the GA Resolutions adopted in 2008, states are encouraged to cooperate with each other and the UN in relation to information sharing and coordination of investigations, as well as the prosecution of UN officials and experts on mission alleged to have committed serious crimes.⁶⁷³

The coordination of investigations and cooperation between the UN and states is essential for ensuring effective and thorough investigations into allegations of SEA (and any misconduct). The new provisions of the Model MoU should go a long way to enabling coordinated and cooperative investigations. This will in turn be strengthened by actions of the CDU in developing operation policy and procedures on investigations of reports of misconduct involving military personnel, which have been developed in consultation and coordination with states and investigative entities including the

⁶⁷⁰ Article 7(2) quater.

⁶⁷¹ Article 7(4)(g) quater.

⁶⁷² Article 7(4)(a)-(e) quater.

⁶⁷³ A/RES/62/63; A/RES/63/119, para. 4.

OIOS.⁶⁷⁴ The CDU has developed mechanisms to ensure that all entities who were previously responsible for or previously received allegations of misconduct forward all complaints to the CDU.⁶⁷⁵ This assures there is one central, independent body that monitors the progress of complaints, and avoids the fragmented investigation system that previously existed. Streamlining and coordinating investigation operations will result in more professional investigations, and also more efficient investigations, which in turns creates more goodwill with victims and local communities. As the UN has adopted policies and measures to guarantee cooperation and coordination, and improved cooperation within its own relevant bodies, states need to adopt appropriate measures and arrangements to make certain that there are procedures available under their domestic law to facilitate the recognition and use of evidence obtained through UN administrative investigations. States also need to address any mutual legal assistance issues that may arise in relation to other states.

In addition to the MoU, as discussed above, coordination of investigations is an issue that could also be addressed by the Draft Convention.⁶⁷⁶ This would be important as the MoU does only cover investigations regarding military personnel, while the Draft Convention would cover investigations into misconduct by officials and experts on mission, (or ideally all personnel) and so ensure no category of personnel remains outside agreements between the UN and states as regards investigation coordination. The following sub-section examines the relevant Draft Convention provisions.

3.6.2. Cooperation and Mutual Legal Assistance under the Draft Convention

3.6.2.1. Cooperation

Under Article 10 of the Draft Convention, state parties are obligated to “afford one another the greatest measure of assistance in connection with investigations or criminal or extradition

⁶⁷⁴ Comprehensive report of conduct and discipline, *supra* note 451, para. 18.

⁶⁷⁵ *Ibid.*, para. 20.

⁶⁷⁶ *Supra* Investigations and the taking into custody of an alleged offender.

proceedings brought in respect of the crimes set out in article 3, including assistance in obtaining evidence at their disposal necessary for the proceedings”,⁶⁷⁷ all actions related to which must be carried out in conformity with any treaties or other arrangement on mutual legal assistance that may exist between parties. “In the absence of such treaties or arrangements, States parties shall afford one another assistance in accordance with their national law.”⁶⁷⁸

This article would benefit from more detail, in the character of other international instruments that deal with mutual legal assistance. One example is found in Article 93 of the Rome Statute, which lists particular necessary means of assistance between the ICC and state parties. Article 93 is not an exhaustive list, but it requires minimum enactment of relevant provisions by state parties within national legislation to ensure adequate mutual legal assistance is possible under state laws (as a requirement under the Rome Statute). Article 93 lists certain assistance in relation to investigations or prosecutions, including the identification and whereabouts of persons or the location of items; the taking of evidence; the questioning of any person being investigated or prosecuted; the service of documents; facilitating the voluntary appearance of persons as witnesses or experts; the execution of searches and seizures; the provision of records and documents; and the identification, tracing, and freezing or seizure or proceeds, property and assets and instrumentalities of crimes. Such a list would be useful under Article 10 of the Draft Convention to provide further direction for state parties when enacting laws or agreements for mutual legal assistance during peacekeeping missions.

A similar list is to be found in the UN Model Treaty on Mutual Assistance in Criminal Matters,⁶⁷⁹ and in the United Nations Convention against Transnational Organized Crime.⁶⁸⁰ While the former is an entire treaty on mutual assistance and thus would be difficult to transmit directly into the Draft Convention, the latter has an excellent example of a detailed provision on mutual legal assistance.⁶⁸¹

Aside from listing purposes of mutual legal assistance, Article 18 of the Convention against

⁶⁷⁷ Article 10(1) Cooperation.

⁶⁷⁸ Article 10(2).

⁶⁷⁹ GA RES 45/117, amended by GA RES 53/112, Article 1.

⁶⁸⁰ GA RES 55/25, 15 November 2000, entered into force 29 September 2003, Article 18.

⁶⁸¹ The Group of Experts in fact mentions in a footnote that consideration may be required of Article 18 of the Convention against Transnational Organized Crime; fn 50 to Article 10.

Transnational Organized Crime includes transfer of information; voluntary transfer of persons to appear as witnesses or experts; the rule of speciality, which prohibits the prosecution of an extradited person for any offence committed prior to their surrender other than the one for which extradition is sought (which is notably absent from the Draft Convention);⁶⁸² central authority and contents of request; reasons for refusal of assistance; and costs. The Convention against Transnational Organized Crime and the EU Convention on Mutual Assistance in Criminal Matters both also contain a provision providing for joint investigation teams. Such a provision would be advantageous in the Draft Convention given that there are several bodies involved in investigation any alleged crimes by peacekeeping personnel- potentially any combination of the UN (administrative investigation), military police, civilian police, sending state authorities, and host state authorities.

Alternatively, the UN could separately adopt a model mutual legal assistance agreement applicable for peacekeeping operations, detailing the means of assistance necessary for adequate cooperation between sending states, the host state and the UN for criminal proceedings. The Draft Convention could have a provision requiring state parties to sign such an agreement and be bound by it when they participate in a PSO. Such an agreement could be in the vein of the EAW, which has been very successful in reducing the time taken for mutual legal assistance matters within the EU.⁶⁸³ The EU has found that updating operational methods to affect flexibility in assistance is a necessity for improving mutual legal assistance, and that this can be done by creating an agreement such as the EAW and issuing guidelines to facilitate the application of the agreement in states.⁶⁸⁴ There is much diversity in procedures in states' legal systems, and the EAW has sought to expedite the mutual legal assistant

⁶⁸² See e.g. K.E. Levitt, 'International Extradition, the Principle of Speciality, and Effective Treaty Enforcement ' (1992) 76 (4) *Minnesota Law Review* 1017-1040; Muther, *supra* note 606, p. 227. See also EAW, Article 27; UN Model Treaty on Extradition, Article 14. N.B. Article 101 of the Rome Statute contains the rule of speciality, but states that State Parties should endeavour to waive such rule.

⁶⁸³ Final Report on mutual legal assistance, *supra* note 612.

⁶⁸⁴ *Ibid.*

process by eliminating states' unnecessary bureaucratic and hierarchical procedures.⁶⁸⁵ By applying the same principle to mutual legal assistance between states involved in PSOs, the process could be greatly sped up and simplified.

The aim would not be to make all national domestic legal systems identical, but to harmonise national domestic legal provisions. In this sense, the goal would be harmonisation meaning approximation or "co-ordination of different legal provisions or systems by eliminating major differences and creating minimum requirements and standards".⁶⁸⁶

3.6.2.2. *Transfer of criminal proceedings and of prisoners*

Article 11 is derived from the United Nations Convention against Corruption,⁶⁸⁷ and requires state parties to consider the possibility of transferring proceedings for prosecution to another state party, "where such a transfer is considered to be in the interests of the proper administration of justice".⁶⁸⁸

This article will enable states to take over prosecution proceedings where the host state is unable or unwilling to conduct such proceedings. It will also allow for troop-contributing countries to consider transferring proceedings to the jurisdiction of the host state, which may result in a more expeditious trial due to proximity of evidence and witnesses.

Article 12 allows state parties to consider entering into agreements or arrangements for the transfer of persons sentenced to their territory, in order to serve out their sentences there.⁶⁸⁹ This is an advantageous provision for state parties, as it allows the investigation and prosecution of a crime by a peacekeeper to take place in the host state (or elsewhere), but for the perpetrator to serve their sentence in their country of nationality.

⁶⁸⁵ *Ibid.* Although, as mentioned above, this is possible due to the integration within the EU, a unique circumstance that would be nigh impossible to replicate on a global scale; Craig and de Burca, *supra* note 610.

⁶⁸⁶ This approximation will also be assisted by the relaxing of the dual criminality requirement. *Ibid.*

⁶⁸⁷ Article 11, fn. 51. United Nations Convention against Corruption, GA RES. 58/4, 31 October 2003, entered into force 14 December 2005.

⁶⁸⁸ Article 11 Transfer of criminal proceedings.

⁶⁸⁹ Article 12 Transfer of prisoners.

3.6.2.3. Evidence obtained in the host State

Article 16 of the Draft Convention is an extremely useful provision.⁶⁹⁰ It is unique in that it applies specifically to the circumstances of a peacekeeping mission, where there are several parties involved—namely, the host state, the sending states, and the United Nations organisation. Under Article 16, a state party is obligated to “ensure that there are procedures available under its national law which provide for the use of evidence obtained by the [UN] in host States in proceedings in that State party for the prosecution of crimes set out in article 3”. This is essentially a more detailed provision concerning mutual legal assistance, as it ensures that state parties will be able to conduct criminal proceedings against a peacekeeper who is a national of that state, even if the evidence has been obtained by the UN in an administrative investigation.

In order to assist with this cooperation, Article 16(2) suggests that the UN may request a state party to “provide relevant advice on the applicable procedures, conditions and requirements under its national law on the admissibility or use of evidence obtained in the host State in proceedings in that State party” for crimes covered by the Draft Convention, committed by peacekeeping personnel. If so requested, the state party in question is required to “provide such advice in a timely manner and shall endeavour to provide other forms of assistance as appropriate”, in order for the UN investigators to ensure they comply with any procedures, conditions and requirements as closely as possible. Following this provision will greatly help to reduce the chances of the failure of criminal proceedings against peacekeeping personnel due to technical reasons such as problems with the chain of evidence. This provision could be subsumed under a more detailed article covering general mutual legal assistance, including joint investigation teams, as discussed *supra*.

3.6.2.4. Notification of outcome of proceedings

Under Article 17, state parties are required to communicate the final outcome of any proceedings against a peacekeeper to the Secretary-General, who in turn must pass on the information to other

⁶⁹⁰ Article 16 Evidence obtained in the host State.

state parties and to the host state.⁶⁹¹ This will assist the UN with accurate data collection in ensuring that misconduct by peacekeeping personnel does not go unpunished. It may also serve as a means for the UN to choose which personnel will serve on peacekeeping missions. If a state party either does not conform to its obligations under this provision, or it does not undertake proceedings against alleged perpetrators, the UN could use this as a reason to prefer the inclusion of nationals of other state parties in PSOs. In reality, however, this is unlikely, given the difficulty the UN has in recruiting personnel for PSOs.

Article 17 is a follow-up to Article 4, and ensures that the UN and other states are aware of compliance- or lack of- by all state parties with the convention. This would essentially be an enforcement measure of the convention, by keeping pressure on states. While reporting may be seen as a weak enforcement measure compared to court adjudication, this does not mean that it will be ineffective in ensuring compliance.⁶⁹² This will render assessment of performance to be a collective action, and increase transparency in the implementation process- in contrast to the current situation in which states are lax in their response to UN follow-ups of investigations.⁶⁹³ Compliance will thus be based on a 'reputation' basis, in which state parties are encouraged to comply rather than be 'shamed' by non-compliance. The transparency can also assist with knowledge sharing, dissemination of information to other state parties on methods of implementation of more intricate requirements under the convention. Overall, this may actually "promote better compliance and a more effective agreement".⁶⁹⁴

This section has discussed the changes the UN has been making to its investigations structure in order to ensure more effective cooperation and mutual legal assistance between the UN and member states. However it has also demonstrated that remains a lack of transparency from the UN, as well as inadequate investigation reporting from states (which may indicate insubstantial

⁶⁹¹ Article 17 Notification of outcome of proceedings.

⁶⁹² Raustiala, *supra* note 585, p. 607.

⁶⁹³ *See supra* Recording and reporting of misconduct cases and data.

⁶⁹⁴ *Ibid.*

investigations). The adoption of the Draft Convention would take steps towards solving these problems through the creation of a binding legal instrument.

3.7. Conclusion

The actions of the UN clearly show the support from and indeed prominence placed by the UN on the prohibition of SEA, and also for criminal accountability for peacekeeping personnel who commit such offences. The UN has made a lot of progress in the areas in which it was deficient, as listed in the introduction and detailed throughout this chapter. The establishment of the Conduct and Discipline Unit has been a major factor in progress in all areas, enabling a single body to concentrate on conduct and discipline issues, thus assuring comprehensive reforms are made in all relevant areas. Advancement has been made from the prevention of SEA to the support and assistance of victims, with positive results being particularly noticeable in the area of investigations. This advancement is not yet complete, as the CDU continues to work on policies, guidelines and other necessary actions for the UN to take. It remains to be seen whether these actions will result in a reduction in the number of allegations of SEA, an outcome which will be able to be monitored through the Secretary-General's reports on sexual exploitation and abuse.⁶⁹⁵ Figures of allegations comparing 2006 and 2007 numbers reveal that, while not yet eliminating SEA, these actions may already be having positive effects: while there were 357 allegations of SEA in 2006, there were 127 in 2007 and 83 in 2008.⁶⁹⁶

UN actions also reveal recognition by the UN that, although it is committed to ensuring regulations within the UN prohibiting SEA by peacekeeping personnel, criminal accountability can only come from a body capable of exercising criminal jurisdiction over the personnel. Unfortunately, SEA and use of prostitutes by peacekeeping personnel continue.⁶⁹⁷

⁶⁹⁵ See the Reports of the Secretary-General, *supra* note 504.

⁶⁹⁶ Figures referring to allegations against DPKO personnel only. *Ibid.* Comprehensive report of conduct and discipline, *supra* note 451, Annex I Number of allegations reported to Conduct and Discipline Unit at Headquarters in 2006/7, for peacekeeping personnel, by number of offence.

⁶⁹⁷ See the Reports of the Secretary-General, *supra* note 504. See also e.g., BBC Newsnight special report, 'UN troops in abuse row', 30 November 2006. See <http://news.bbc.co.uk/2/hi/programmes/newsnight/6196710.stm>;

Reports have highlighted the preference for host state jurisdiction, but have recognised difficulties that may arise as regards the execution of this jurisdiction, and thus also stress the need for sending states to have adequate criminal jurisdiction over their own nationals. The reports, Draft Convention and revised draft MoU aim to ensure host states and contributing states have the jurisdiction to ensure criminal accountability for peacekeeping personnel, and that such jurisdiction is exercised.

The UN simply does not have the jurisdiction to prosecute peacekeeping personnel. Disciplinary action the UN can take against mission staff includes dismissal, and for MilObs, military personnel, CivPol and members of formed police units, extends to repatriation.⁶⁹⁸ The UN however, is seeking to obligate states to undertake the role it cannot, the prosecution of criminal misconduct. What is clear is that responsibility for exercising criminal jurisdiction over peacekeeping personnel, for ensuring criminal accountability, lies with states. The Draft Convention has been given particular attention in this chapter. It seeks to fill jurisdictional gaps that have long existed over mission personnel. The Draft Convention aims to bind states to exercise criminal jurisdiction over all peacekeeping personnel (in the case of the host state) or at least over their own national peacekeeping personnel who are officials or experts on mission.

The Draft Convention is indeed just that- a draft. It will go through many changes and negotiations over provisions before it has a chance of being adopted as an international convention by member states of the UN. The most important changes need to be made to the scope of application- both *ratione personae* and *ratione materiae*. A final convention must apply to all peacekeeping personnel, regardless of status. While the mandate of the Group of Legal Experts was to assess the criminal accountability of only officials and experts on mission, it is illogical to create an international instrument that only applies to a certain group of peacekeeping personnel and not all of them. This is particularly important given the fact that the majority of allegations of SEA committed by

Jane Holl-Lute, 'Press Conference by Assistant Secretary-General for Peacekeeping Operations on Allegations of Sexual Exploitation and Abuse by Peacekeeping personnel', UN DPI, News and Media Division, New York, 5 January 2007; Statistics on the CDU website <http://cdu.unlb.org/>.

⁶⁹⁸ Comprehensive report of conduct and discipline, *supra* note 451, para. 14.

peacekeeping personnel are committed by military personnel,⁶⁹⁹ who are subject to absolute immunity from host state jurisdiction which cannot be waived by the UN as they are subject to the exclusive jurisdiction of their sending state.⁷⁰⁰ Therefore, it should be a priority that they are not excluded from the scope of application of any international convention aiming to secure criminal accountability for peacekeeping personnel. The fact that exclusive jurisdiction is and always has been granted to the sending state over military personnel through the SOFA has obviously not led to comprehensive disciplinary and criminal actions, nor effective prevention of SEA by military personnel. An international convention would be binding and enforceable against the state for violations of the convention, and require the sending state to take complete actions against any misconduct that amounts to criminal conduct.

The Ad Hoc Committee on criminal accountability of UN officials and experts on mission has also observed that a specific lacuna in the Draft Convention is the fact that the Draft Convention does not address practical problems arising from competing jurisdictions and how competing requests might be dealt with. The Report states that these “matters would be addressed in the same manner as in other conventions which also provided for the establishment of jurisdiction by more than one State”.⁷⁰¹

The Draft Convention is also lacking in certain elements dealing with criminal law concepts, such as clarity of grounds of criminal responsibility, grounds for exclusion of criminal responsibility (defences), and such principles as non-retroactivity. This Draft Convention deals with criminal accountability, and takes tentative steps towards being a guide to criminalisation and ensuring

⁶⁹⁹ Over 70% of allegations involve military personnel. From 2003-2008, 537 out of 767 allegations concerned military personnel. *See* statistics from Special measures for protection from sexual exploitation and sexual abuse, Secretary-General’s Reports of sexual exploitation and abuse investigation data: A/59/782, Annex 1 Nature of allegations, by United Nations entity and category of personnel, 1 January- 31 December 2004; A/60/861, Annex I Nature of allegations, by United Nations entity and category of personnel, 1 January- 31 December 2005; A/61/957 Annex VI Nature of allegations, by personnel of the Department of Peacekeeping Operations, 1 January-31 December 2006; A/62/890, Annex VI Nature of allegations in completed investigations, by category of personnel of the DPKO/DFS, 1 January- 31 December 2007; A/63/720, Annex V Nature of allegations, by category of personnel of the DPKO/DFS, for completed investigations, 1 January- 31 December 2008.

⁷⁰⁰ *See* discussion *supra* Immunity; *see also* Working paper, *supra* note 623, para. 35.

⁷⁰¹ Report of the Ad Hoc Committee on criminal accountability of United Nations officials and experts on mission, First session (9-13 April 2007), A/62/54, Annex, para. 6 (hereinafter ‘First session report of the Ad Hoc Committee’).

criminal accountability, but does not make sufficient cogent progression. More detailed and precise provisions will enable state parties to have a clearer position as to how they can comply with their obligations under the convention. The convention could include model provisions as a guide for states to enact into national law. Certain aspects of the Rome Statute would be a good guide to follow in this regard, such as Part 3, which deals with general principles of criminal law such as grounds of criminal responsibility. While the Draft Convention is not establishing a court, it needs to obligate state parties to criminalise harmful conduct by peacekeeping personnel in a comprehensive manner, rather than only in a partial manner. Following concepts, definitions, phrasings and principles from the Rome Statute would be useful because the Rome Statute is the first wholly international instrument that deals with criminal law; the first instrument with terms agreed upon by the international community through extensive negotiations.⁷⁰² The Rome Statute represents an agreement of the most internationally recognised principles, concepts, and definitions of criminal law.

The other dilemma of the Draft Convention is that it does not adequately obligate states to criminalise and prosecute crimes.⁷⁰³ It requires states to establish certain types of jurisdiction but provides too many loopholes through which state parties can avoid enforcing this jurisdiction, including those mentioned in the discussion of Articles 3, 5, 6 and 7. That being said, it would be questionable whether states would agree to ratify a convention containing all the requirements as suggested in this paper for these provisions. This is one drawback of a convention- it is a strong agreement that signals a state is serious about commitment, but because it requires a high level of compliance from states (both domestically and internationally), states are more likely to negotiate weaker provisions.⁷⁰⁴ While the aim of the convention would be to ensure criminalisation and prosecution, and the suggested changes in this paper to strengthen provisions would be ideal in

⁷⁰² The Nuremberg and Tokyo Tribunals, the ICTY and the ICTR may be international tribunals, but the process of formulating the statutes of these tribunals was nowhere as complex or as lengthy as the negotiation process for the establishment of the Rome Statute, and nor were as many countries involved in the process.

⁷⁰³ O'Brien, *supra* note 561, pp. 73-75.

⁷⁰⁴ Raustiala, *supra* note 585, pp. 598, 601-2.

attaining this goal, more flexible, general provisions would encourage more states to ratify the convention as they would be easier to comply with.

It is true that there are disadvantages to an international convention, the foremost of which is the principle of *pacta tertiis nec nocent nec prosunt*.⁷⁰⁵ However, the continuing occurrences of SEA committed by peacekeeping personnel demonstrate that organisational administrative regulations are insufficient deterrents. While criminalisation is not the only answer to solving many problems that arise in post-conflict societies,⁷⁰⁶ in terms of behaviour such as SEA, criminalisation and, most importantly, prosecution of offenders, is the strongest deterrent to such behaviour. States involved in PSOs may have obligations under newly negotiated MoUs to ensure they have jurisdiction over their personnel, but a convention would be a much stronger instrument with more enforceability, as seen in the discussion of Articles 4 and 17. There are certainly complexities in the adoption of a convention which seeks to regulate state parties' domestic criminal law, particularly given the "disparity in the criminal laws and procedures of different States".⁷⁰⁷ However, a pragmatic approach to the drafting of the convention will enable the identification of specific crimes to be targeted,⁷⁰⁸ and ensure effective mutual legal assistance. It will also achieve the overall goals of deterring peacekeeping personnel from committing SEA, and the repudiation of impunity for any peacekeeper who commits such an offence.

The following chapter will look to how sending states can enact accountability after immunities, jurisdiction and cooperation have been dealt with. Deficiencies in national law that may be solved through the adoption of the Draft Convention will be highlighted.

⁷⁰⁵ Article 34, Vienna Convention on the Law of Treaties, 1969, UNTS, vol. 1155, p. 331, entered into force on 27 January 1980.

⁷⁰⁶ See e.g. D. Otto, 'Making sense of zero tolerance policies in peacekeeping sexual economies', in Munro and Stychin (eds.), *Sexuality and the Law: Feminist Engagements*, (Glasshouse Press, London 2007), 259-282.

⁷⁰⁷ First session report of the Ad Hoc Committee, *supra* note 701, para. 6.

⁷⁰⁸ *Ibid.*, para. 24.

4. National Criminal Jurisdiction

4.1. Introduction

It was demonstrated in the preceding chapters that gender-based violence against women by peacekeepers amounts to conduct that should be criminalised. Such violence is a violation of rights. It has been recognised by the UN that this conduct is criminal and must be investigated and prosecuted. However, the UN has also acknowledged that, while it has the power to undertake administrative organisational investigations, the organisation does not have the legal capacity to undertake criminal investigations and prosecutions. Only national and international courts and tribunals have this power. Chapter 3 demonstrated an emphasis on the role of states to prosecute their own nationals for crimes committed, encouraged by the UN through the Secretariat and the General Assembly, and affirmed in the Draft Convention on Criminal Accountability. Therefore it is necessary to assess how states can execute criminal investigations and prosecutions of these gender-based crimes committed by their nationals when engaged in a peace support operation.

This chapter will examine the jurisdictions of Australia and the United States, in order to assay the role of national criminal jurisdictions in prosecuting peacekeepers. The assessment of the two jurisdictions will demonstrate that national jurisdiction is the most effective method of prosecuting misconduct by peacekeepers. Yet the examination will also show where national systems fail in their ability to exercise criminal jurisdiction over peacekeepers that have committed gender-based crimes. Different national systems have different lacunae, but one common gap found is that of the absence of the offence of sexual exploitation. The Draft Convention offers great potential to assist states with ensuring such omissions no longer exist. The case studies will examine both substantive legislation and jurisdictional legislation and case law.⁷⁰⁹

⁷⁰⁹ Jurisdiction is referred to as procedural law in some countries, and as substantive in others. *E.g.* the United States views jurisdiction to adjudicate and jurisdiction to enforce as part of criminal procedure; whereas Canada views all issues of jurisdiction as part of substantive law. See E. Silverman, 'Prosecution of International Crimes in the United States of America', in Eser, et al. (eds.), *National Prosecution of International Crimes [Nationale Strafverfolgung völkerrechtlicher Verbrechen]*, (Duncker & Humblot, Berlin 2005), p. 445; and T. Gut and M.

The laws of Australia and the US will be examined as both are troop contributing states to peace support operations (PSOs). Australians have been involved in missions in countries such as East Timor and Somalia, and Americans in such places as Haiti and Kosovo.⁷¹⁰ The US is the top financial contributor to peace missions.⁷¹¹ Both states have had allegations of misconduct by peacekeeping personnel, including a successful prosecution in the US of a military staff sergeant for sodomy and murder of a young girl in Kosovo.⁷¹² Both states are English-speaking, common law countries with an Anglo military and legal heritage, and it is interesting to see the different developments that have taken place in each country.

As mentioned in the previous chapter, military personnel make up the majority offenders in allegations of sexual exploitation and abuse.⁷¹³ The main focus of this thesis is on military personnel, and so this chapter will examine the law applicable to military personnel (and civilian personnel deployed by the military) of each state.

4.2. Jurisdiction

The concept of jurisdiction has been discussed in Chapter 3. Jurisdiction of a state is the power of that state to govern persons and property; prescriptive jurisdiction is the right to prescribe laws, and

Wolpert, 'Prosecution of International Crimes in Canada', in Eser, et al. (eds.), *National Prosecution of International Crimes [Nationale Strafverfolgung völkerrechtlicher Verbrechen]*, (Duncker & Humblot, Berlin 2005), pp. 40-41. In this thesis, only crimes of individual responsibility will be dealt with.

⁷¹⁰ See Monthly Summary of Contributors to UN Peacekeeping Operations <http://www.un.org/Depts/dpko/dpko/contributors/>. See also M.J. Kelly, et al., 'Legal aspects of Australia's involvement in the International Force for East Timor' (2001) (841) *International Review of the Red Cross* 101-139.

⁷¹¹ See generally, Financing of UN Peacekeeping Operations <http://www.un.org/Depts/dpko/dpko/contributors/financing.html>.

⁷¹² *United States v Ronghi*, No. ARMY 20000635, (A. Ct. Crim. App. May 27, 2003); *United States v Ronghi*, No. 03-0520, 60 MJ 83, decided 30 June 2004.

⁷¹³ Over 70% of allegations involve military personnel. From 2003-2008, 537 out of 767 allegations concerned military personnel. See statistics from Special measures for protection from sexual exploitation and sexual abuse, Secretary-General's Reports of sexual exploitation and abuse investigation data: A/59/782, Annex 1 Nature of allegations, by United Nations entity and category of personnel, 1 January- 31 December 2004; A/60/861, Annex I Nature of allegations, by United Nations entity and category of personnel, 1 January- 31 December 2005; A/61/957 Annex VI Nature of allegations, by personnel of the Department of Peacekeeping Operations, 1 January-31 December 2006; A/62/890, Annex VI Nature of allegations in completed investigations, by category of personnel of the DPKO/DFS, 1 January- 31 December 2007; A/63/720, Annex V Nature of allegations, by category of personnel of the DPKO/DFS, for completed investigations, 1 January- 31 December 2008. See also Statistics on CDU website <http://cdu.unlb.org/>.

enforcement jurisdiction is the power to enforce such laws.⁷¹⁴ It was shown in Chapter 3 that jurisdiction has traditionally been viewed as linked to state sovereignty, and is territorial,⁷¹⁵ but that, provided there is no specific rule to the contrary, jurisdiction may be enacted extra-territorially, at the discretion of states.⁷¹⁶ If a state engages its personnel in a PSO, those personnel are subject to the exclusive jurisdiction of their sending state.⁷¹⁷ Personnel are located outside the territory of their sending state; thus, in order for a sending state to ensure it has the ability to exercise criminal jurisdiction over its personnel and nationals, it is necessary for a sending state to expressly enact law granting extra-territorial jurisdiction. This is generally common for military personnel, but can be significantly more complex when concerning non-military personnel. Both Australia and the United States have laws expressly granting extra-territorial jurisdiction over military and civilian personnel, although it was clearly an arduous and long journey for the US to enact extra-territorial jurisdiction over non-military personnel.

4.2.1. Applicable Law to Australian Defence Force Personnel

Discipline and criminal accountability of Australian Defence Force (ADF) personnel are governed by the *Defence Force Discipline Act* (DFDA).⁷¹⁸ ADF personnel can be prosecuted for the commission of offences under Part III of the DFDA, such as offences relating to operations against the enemy and offences relating to ships, vehicles, aircraft and weapons. Such offences are referred to as service offences,⁷¹⁹ and criminal liability for such offences is determined by Chapter 2 of the federal *Criminal*

⁷¹⁴ I. Brownlie, *Principles of Public International Law*, 7th ed., (Oxford University Press, Oxford 2008), p. 299; M. Dixon and R. McCorquodale, *Cases And Materials On International Law*, 4th ed., (Oxford University Press, Oxford 2003), p. 268; D. Harris, *Cases and Materials on International Law*, 6th ed., (Sweet & Maxwell, London 2004), p. 265.

⁷¹⁵ *The Case of the S.S. "Lotus", France v Turkey*, PCIJ, Ser. A, No. 10 (1927) (*Lotus Case*), pp. 18, 20; Dixon and McCorquodale, *ibid.*, p. 268.

⁷¹⁶ *Lotus Case*, pp. 19, 20.

⁷¹⁷ See *supra* Chapter 3.3 Jurisdiction.

⁷¹⁸ *Defence Force Discipline Act* (Cth) 1982.

⁷¹⁹ The DFDA interpretation states "service offence means:

- (a) an offence against this Act or the regulations;
- (b) an offence that:
 - (i) is an ancillary offence in relation to an offence against this Act or the regulations; and
 - (ii) was committed by a person at a time when the person was a defence member or a defence civilian;
 or
- (c) an old system offence."

Code Act (Cth) which determines the general principles of criminal responsibility.⁷²⁰ Chapter 2 of the *Criminal Code Act* covers elements of offences, defences, extensions of criminal responsibility and geographical jurisdiction.⁷²¹

Under s. 61 of the DFDA, a defence member or a defence civilian⁷²² is guilty of an offence if the person engages in conduct in or outside the Jervis Bay Territory, whether or not in a public place, and engaging in that conduct would be a Territory offence, if it took place in the Jervis Bay Territory. Maximum punishment for such offences is the fixed punishment set for the relevant Territory offence, or otherwise a punishment that is not more severe than the maximum punishment for the relevant Territory offence. The DFDA defines a Territory offence as:

“(a) an offence against a law of the Commonwealth in force in the Jervis Bay Territory other than this Act or the regulations; or

“(b) an offence punishable under any other law in force in the Jervis Bay Territory (including any unwritten law) creating offences or imposing criminal liability for offences.”⁷²³

⁷²⁰ *Criminal Code Act* (Cth) 1995.

⁷²¹ See next sub-section for explanation of geographical jurisdiction.

⁷²² Defence member is defined as

“(a) a member of the Permanent Navy, the Regular Army or the Permanent Air Force; or

(b) a member of the Reserves who:

(i) is rendering continuous full time service; or

(ii) is on duty or in uniform.”

Defence civilian is defined as:

“a person (other than a defence member) who:

(a) with the authority of an authorized officer, accompanies a part of the Defence Force that is:

(i) outside Australia; or

(ii) on operations against the enemy;

and has consented, in writing, to subject himself or herself to Defence Force discipline while so accompanying that part of the Defence Force.”

DFDA, s. 3 Interpretation.

⁷²³ Notes to the definition:

Note 1: Paragraph (a) of this definition includes an offence (an ancillary Territory offence) against section 11.1 (attempt), section 11.4 (incitement) or section 11.5 (conspiracy) of the Criminal Code or section 6 (accessory after the fact) of the Crimes Act 1914 in relation to another Territory offence within the meaning of that paragraph.

Note 2: Paragraph (b) of this definition includes an offence (an ancillary Territory offence) against section 44 (attempt), section 47 (incitement) or section 48 (conspiracy) of the Criminal Code 2002 of the Australian Capital Territory or section 181 (accessory after the fact) of the Crimes Act 1900 of the Australian Capital Territory in relation to another Territory offence within the meaning of that paragraph.

Note 3: The laws of the Australian Capital Territory in force in the Jervis Bay Territory apply, and Chapter 2 of the Criminal Code does not apply, for the purpose of determining criminal liability for offences referred to in paragraph (b) of this definition.

The Jervis Bay Territory is located within the state of New South Wales, but was acquired by the federal Commonwealth government in order to ensure the federal government access to the sea, through the *Jervis Bay Territory Acceptance Act* (the *Acceptance Act*).⁷²⁴

Aside from service offences under the DFDA, ADF personnel can be prosecuted for the commission of offences that would be Jervis Bay Territory offences. Although the Jervis Bay Territory is not part of the Australian Capital Territory (ACT), s. 4A of the *Acceptance Act* states that:

“Subject to this Act, the laws (including the principles and rules of common law and equity) in force from time to time in the Australian Capital Territory are, so far as they are applicable to the [Jervis Bay] Territory and are not inconsistent with an Ordinance, in force in the Territory as if the Territory formed part of the Australian Capital Territory.”⁷²⁵

It is also explicitly stated that, unlike in the case of service offences under the DFDA, “Chapter 2 of the *Criminal Code [Act]* does not apply in relation to, or in relation to matters arising under, a law in force in the Territory because of section 4A.”⁷²⁶ Thus criminal responsibility is determined by the relevant act under which offences are deemed to have been committed. The principle piece of legislation under which Territory offences are prosecuted is the *Crimes Act* (ACT).⁷²⁷

The system governing the applicable law is clearly quite complex. It also raises the question of whether it is appropriate to use the laws of one territory (or state) as the applicable law over ADF personnel when serving abroad. Australia is a federation of states and territories, and criminal law falls under the ambit of both federal and state/territory law. Federal law applies throughout the country, but each state or territory law only applies within the boundaries of that state or territory. Criminal laws and their application may differ between the states and territories, as will be seen *infra* in the discussion on HIV/AIDS-related crimes. Thus, the criminal law of the ACT is not necessarily representative of the laws of the Commonwealth of Australia as a whole, and therefore it may not be

⁷²⁴ *Jervis Bay Territory Acceptance Act* (Cth) 1915.

⁷²⁵ Section 4A(1) of the *Acceptance Act*. See also Official government website of the Jervis Bay Territory, as administered by the Commonwealth Minister for Regional Services Territories and Local Government; at http://www.dotars.gov.au/territories/jervis_bay/governance.aspx.

⁷²⁶ S. 4AA of the *Acceptance Act*.

⁷²⁷ *Crimes Act* (ACT) 1900.

appropriate to apply these territorial laws to ADF personnel when serving abroad, or stationed elsewhere within Australia. The most prominent example of this is seen in the fact that prostitution is not criminalised in the ACT, which creates problems with regards to the prosecution of peacekeepers for, e.g. patronising a prostitute.⁷²⁸

It would be easier to have a more limited scope of laws under which ADF personnel fall. ADF personnel do also fall under the jurisdiction of the federal *Criminal Code Act*, however this is only when such relevant offences are deemed to have extraterritorial jurisdiction (see below). Specific offences and their jurisdiction are discussed below.

4.2.2. Extraterritorial Jurisdiction over Australian Defence Force Military and Civilian Personnel

Section 9 of the DFDA expressly grants extraterritorial operation of all provisions of the DFDA.

“9 Extra territorial operation of Act

The provisions of this Act apply, according to their tenor, both in and outside Australia but do not apply in relation to any person outside Australia unless that person is a defence member or a defence civilian.”

Hence, all offences committed by ADF personnel, whether they be service offences under the DFDA or civil criminal offences under ACT law, are applicable extraterritorially.

With regards to the *Criminal Code Act*, all applicable offences are designated as having extraterritorial application through Part 2.7 of the *Criminal Code Act*,⁷²⁹ which means the *Criminal Code Act* has extraterritorial jurisdiction over defence military and civilian personnel. Part 2.7 delineates both standard⁷³⁰ and extended geographical jurisdiction.⁷³¹ Standard jurisdiction covers offences in which conduct constituting an offence or a result of the conduct occurs wholly or partly within Australia. Extended geographical jurisdiction grants different categories of extended jurisdiction over conduct committed outside Australia, including conduct committed wholly outside

⁷²⁸ This is discussed *infra* in Prostitution-related Conduct.

⁷²⁹ *Criminal Code Act*, Chapter 2, Part 2.7 Geographical jurisdiction.

⁷³⁰ Part 2.7, Division 14.

⁷³¹ Part 2.7, Division 15.

Australia by an Australian citizen or by a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory.

Extended geographical jurisdiction is categorised from Category A to D.⁷³² Category D is the most extensive, granting jurisdiction over conduct “(a) whether or not the conduct constituting the alleged offence occurs in Australia; and (b) whether or not a result of the conduct constituting the alleged offence occurs in Australia”, and is not restricted to Australian citizens or nationals.⁷³³ Which jurisdictional category a particular offence falls under is provided in the section that applies to the offence. For example, Category D applies to genocide, war crimes and crimes against humanity, rendering all ADF personnel subject to being prosecuted for such offences.⁷³⁴

The Constitutional validity of the exercise of extraterritorial application of civilian criminal law over military personnel was considered in the 2004 case *Re Colonel Aird*.⁷³⁵ The case raises issues particularly relevant to the consideration of criminal jurisdiction over Australian peacekeepers for gender-based crimes committed while involved in a PSO. Private Alpert was a defence member serving in Malaysia. It was alleged that, while on leave in Thailand, he raped an English woman. Alpert was charged under the ACT *Crimes Act*, under the authority granted by the DFDA, and was to be prosecuted by a general court martial in Australia.

The issue in question in the case was whether the Constitutional defence power⁷³⁶ granted the Commonwealth the power to exercise extraterritorial jurisdiction over defence personnel in respect of the alleged offence. The issue was based on the ‘service connection’ versus ‘service status’ test, concepts that determine whether or not the military has jurisdiction over a person. The ‘service connection’ argument requires the crime itself to have a connection with the military. The ‘service

⁷³² See Appendix 3 for full text of Part 2.7, Division 15 Extended Geographical Jurisdiction.

⁷³³ Part 2.7, Division 15, s. 15.4.

⁷³⁴ Chapter 8 Offences against humanity and related offences, Division 268 Genocide, crimes against humanity, war crimes and crimes against the administration of the justice of the International Criminal Court, Subdivision K- Miscellaneous, s. 268.117 Geographical jurisdiction.

⁷³⁵ *Supra* note 67.

⁷³⁶ *Supra* note 66.

status' argument maintains the valid exercise of criminal jurisdiction over defence personnel based solely on their status as a defence member.⁷³⁷

The question in *Re Colonel Aird* was: given that Alpert was on leave, in civilian clothing, on a holiday paid for by his money, was it a valid exercise of the defence power to charge him with rape under the DFDA authority? The 4-3 decision confirmed that the 'service connection' test is the applicable test in Australian law. However, the method of application of that test was not entirely agreed upon by the judges. Justice McHugh felt that "the prohibition against rape goes to the heart of maintaining discipline and morale in the Defence Force. Rape and other kinds of sexual assault are acts of violence. It is central to a disciplined defence force that its members are not persons who engage in uncontrolled violence."⁷³⁸

It was held to be irrelevant that the alleged rape was committed while Alpert was on leave. "A soldier who rapes another person undermines the discipline and morale of his army. He does so whether he is on active service or recreation leave."⁷³⁹

Further reasons behind the majority judgment emphasise the existence of the military as a 'special community', the importance of concepts such as discipline and morale to the military community, and how the commission of serious crimes can impact on this.

"[I]t need hardly be said that other members of the Defence Force will be reluctant to serve with personnel who are guilty of conduct that in the Australian Capital Territory amounts to rape or sexual assault. This may be out of fear for personal safety or rejection of such conduct or both. Such reluctance can only have a detrimental effect on the discipline and morale of the armed services."⁷⁴⁰

The majority view also based the decision on the special position of the military in the global community, which has particular resonance in the context of PSOs. The potential impact of such serious criminal behaviour by members of the ADF was held to be an important reason for the

⁷³⁷ This is the view now followed in the US. See discussion *infra*; *Solorio v United States* 483 U.S. 435 (1987).

⁷³⁸ At 322.

⁷³⁹ Per Justice McHugh at 323.

⁷⁴⁰ Justice McHugh at 322.

service connection. Justice McHugh rightly pointed out that, whether on leave or not, defence personnel are perceived by foreign governments and local people as representatives of the Australian government, and that it is irrelevant if defence personnel are in civilian dress or not.⁷⁴¹ The judge recognised that the commission of undesirable conduct by ADF personnel may result in criticism and even hostility by the local community towards the ADF and its members.⁷⁴² The behaviour may even result in opposition from the government to the presence of ADF personnel in the country. Such reactions would not only have a negative impact on the discipline and morale of defence personnel, but may seriously damage inter-state relations and result in the ADF being ejected from or refused entry into a state for purposes such as training or peacekeeping.⁷⁴³

It was also held that the application of one set of standards to ADF personnel serving overseas, regardless of local laws, was necessary. Applying standard regulations and laws results in avoidance of complications as to which laws are applicable, as well as ensuring appropriate behaviour of ADF personnel at all times.

“[W]hile defence members serving overseas must obey local laws, the imposition of minimum standards of behaviour by reference to Australian law is a legitimate means of preserving discipline, bearing in mind that Australian forces might be located in places where there is no government, or where there is a hostile government, or where peacekeeping is necessary... If it is accepted to be a proper concern of Parliament to require defence members, when serving overseas, to behave according to standards of conduct prescribed by Australian law, then there is power to impose such a requirement generally; it does not vary according to local circumstances and conditions in different places.”⁷⁴⁴

In contrast, the dissent of Justices Callinan and Heydon argued that there was an insufficient ‘service connection’ for the charge to be a valid exercise of power. Their Honours felt that applying the ‘service connection’ test to any conduct that constitutes “an undisciplined application of force” or “would be regarded as abhorrent by other soldiers” would be over inclusive.⁷⁴⁵

⁷⁴¹ *Ibid.*

⁷⁴² *Ibid.*

⁷⁴³ *Ibid.*

⁷⁴⁴ Per Chief Justice Gleeson at 314.

⁷⁴⁵ At 351.

Justice Kirby's dissent also declined to overextend the reach of the defence extraterritorial jurisdiction, but was the only judgment to consider the validity of the exercise of extraterritorial jurisdiction. After reference to passive and active nationality jurisdiction, he concluded that the exercise of such extraterritorial jurisdiction was entirely legitimate under international law.⁷⁴⁶

It was an accepted fact in the case that Thailand also held jurisdiction over Alpert, but that the ADF had assumed jurisdiction because the complainant had made the complaint to the ADF and not the Thai authorities; and that Thailand had not made any application for surrender of Alpert.⁷⁴⁷

Re Colonel Aird plainly demonstrates that Australian law supports the prosecution of ADF personnel for crimes committed when posted overseas in any capacity, even when committed on leave. The 'service connection' test may be more restrictive than the 'service status' test, but it is nonetheless broadly interpreted, and liberally applied. The majority decisions clearly apply this interpretation based on comprehension of the military as a 'special community' which abides by different principles from the ordinary civilian community. It is appropriate that the potential negative repercussions of such conduct to Australia's international position and the ability of the ADF to be involved in international deployments are also recognised.

4.2.3. Applicable Law and Extraterritorial Jurisdiction over the United States Armed Forces

The United States has express extraterritorial jurisdiction over crimes committed by members of its Armed Forces (USAF). Members of the Armed Forces are subject to the US Uniform Code of Military Justice (UCMJ),⁷⁴⁸ which specifically declares that it "applies in all places".⁷⁴⁹ This jurisdiction applies at all times. Thus, there is absolutely no issue as to the question of UCMJ extraterritorial jurisdiction over the Armed Forces.⁷⁵⁰

⁷⁴⁶ At 339-344.

⁷⁴⁷ It was also noted that England also held legitimate jurisdiction, as the complainant was an English national. Per Gummow J.

⁷⁴⁸ Uniform Code of Military Justice (UCMJ), 10 U.S.C.

⁷⁴⁹ Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 805. Art. 5.

⁷⁵⁰ Persons subject to the UCMJ include "members of a regular component of the armed forces", "in time of declared war or a contingency operation, persons serving with or accompanying the armed force in the field",

It was discussed *supra* that in the Australian military, jurisdiction is granted through the liberal application of the ‘service connection’ test. There was previously a service connection requirement for court-martial jurisdiction in the US;⁷⁵¹ however there was an exception to this requirement for military personnel assigned overseas.

“The exception to the overseas rule rested in the possibility that extraterritorial application of the federal penal code might exist. Thus, if the overseas offense could have been prosecuted in a United States federal court, and the accused would be entitled to the right to indictment and jury trial, the military prosecutor was required to establish service connection over the offense.”⁷⁵²

Now there is no longer a service connection requirement at all; as a result this does not create any issues for jurisdiction over any UCMJ crimes. This requirement was deemed no longer necessary by the Supreme Court in *Solorio v United States*,⁷⁵³ which involved sex offences against young children. The Supreme Court held that jurisdiction is based on the status of the accused as a member of the armed forces, and not a connection of the offence to service.

Alongside the UCMJ, provisions of the US Code may apply to the USAF, such as Title 18, the War Crimes Act. This will be dependent on the extraterritorial application of the provision. Such extraterritorial application of relevant provisions will be addressed *infra*. However, while it is civilian criminal law which is the main applicable law for ADF personnel, the UCMJ is the principal piece of legislation which governs conduct of the US military, and it is preferred that USAF personnel are charged under the UCMJ.⁷⁵⁴

and “subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands”; 10 U.S.C. § 802. Art. 2 (a); as amended by the John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 552, 120 Stat. 2083 (2007).

⁷⁵¹ Jurisdiction was limited to offences that were ‘service-connected’. See *O’Callaghan v Parker*, 395 U.S. 258 (1969) and *Relford v Commandant*, 420 U.S. 738 (1975).

⁷⁵² D.A. Schlueter, *Military Criminal Justice: Practice and Procedure*, 6th ed., (LexisNexis, 2004), p. 231.

⁷⁵³ *Solorio v United States* 483 U.S. 435 (1987).

⁷⁵⁴ See e.g. *infra* War Crimes and Crimes Against Humanity.

4.2.4. Applicable Law and Extraterritorial Jurisdiction over US Civilians Accompanying or Employed by the Armed Forces

In contrast to the existence of extraterritorial jurisdiction over ADF civilians, extraterritorial jurisdiction over civilians accompanying or employed by the United States Armed Forces has had an unfortunate history, and, throughout the latter half of the 20th Century, simply did not exist.⁷⁵⁵ It was a significant gap in jurisdiction that did not go unnoticed. Between 1957 and 2000, more than 30 bills were introduced into Congress in an attempt to solve this jurisdictional problem, but none were passed.⁷⁵⁶

The UCMJ declares that certain persons are subject to the Code; including those who are not part of the regular armed forces.

(10) In time of war, or contingency operation, persons serving with or accompanying an armed force in the field.

(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.⁷⁵⁷

The Supreme Court of the United States has declared that the exercise of jurisdiction of a military court-martial over a civilian under these sections during peacetime is unconstitutional.⁷⁵⁸ Peacetime was defined as any situation where the United States has not declared war.⁷⁵⁹ A US declaration of

⁷⁵⁵ Prior to this, extraterritorial jurisdiction over civilians was covered by the Articles of War. See J.R. Perlak, 'The Military Extraterritorial Jurisdiction Act of 2000: Implications for Contractor Personnel' (2001) 169 *Military Law Review* 92-140, p. 96.

⁷⁵⁶ *United States v. Gatlin*, 216 F.3d 207 (2000) at 222; F.A. Stein, 'Have We Closed the Barn Door Yet? A Look at the Current Loopholes in the Military Extraterritorial Jurisdiction Act' (2005) 27 *Houston Journal of International Law* 579-607, p. 591.

⁷⁵⁷ 10 U.S.C. § 802. Art. 2(a)(10) and (11).

⁷⁵⁸ *Reid v. Covert*, 354 U.S. 1 (1957); *Kinsella v. Krueger* 351 U.S. 470 (1956). See also now Manual for Courts-Martial United States (2008 Edition), Part II Rules for Courts-Martial, Chapter II Jurisdiction, R.C.M. 202(a)(4).

⁷⁵⁹ Only federal Congress has the power to declare war: *National Sav. & Trust Co. v. Brownell*, 222 F.2d 395 (D.C. Cir. 1955); *Atlee v. Laird*, 347 F. Supp. 689 (E.D. Pa. 1972), judgment aff'd, 411 U.S. 911, 93 S. Ct. 1545, 36 L. Ed. 2d 304 (1973); *Atlee v. Laird*, 339 F. Supp. 1347 (E.D. Pa. 1972), judgment aff'd, 411 U.S. 911, 93 S. Ct. 1545, 36 L. Ed. 2d 304 (1973); *Mottola v. Nixon*, 318 F. Supp. 538 (N.D. Cal. 1970), order rev'd on other grounds, 464 F.2d 178 (9th Cir. 1972); *Even v. Clifford*, 287 F. Supp. 334 (S.D. Cal. 1968). Participation in a war can be authorized by a "constitutional equivalent" for a congressional declaration of war or by a specific ratification of executive actions: *DaCosta v. Laird*, 448 F.2d 1368 (2d Cir. 1971); *Com. of Mass. v. Laird*, 451 F.2d 26 (1st Cir. 1971); *Meyers v. Nixon*, 339 F. Supp. 1388 (S.D.N.Y. 1972).

war has not occurred since World War II.⁷⁶⁰ *Reid v Covert* was the first case to remove this extraterritorial jurisdiction, in relation to civilian dependants of military personnel.⁷⁶¹

Several more prominent cases reached the Supreme Court before the end of the 1900s, upholding the gap in jurisdiction of the UCMJ.⁷⁶² In 1960, the Supreme Court declared the gap in jurisdiction to extend also to non-capital offences in *Kinsella v Singleton*.⁷⁶³ In the same year, the Supreme Court dealt with two cases concerning extraterritorial jurisdiction over civilian employees, one a capital offence and one a non-capital offence.⁷⁶⁴ In both cases, the Court held that the jurisdiction of a court-martial over civilian employees in peacetime was likewise unconstitutional and thus invalid.

In 1969, the Court of Appeals stated that even if it was willing to assert that the Vietnam War was an officially declared war, it declined to allow court-martial jurisdiction over a merchant seaman for murder whilst on a port-call in Da Nang because the circumstances were too remote to permit jurisdiction.⁷⁶⁵ A 1970 case, *United States v Avarette*, dealt with a civilian employee, who had been employed as an Army contractor in Vietnam.⁷⁶⁶ Avarette was convicted by a court martial of conspiracy to commit larceny and attempted larceny. The Court of Military Appeals (CMA) refused to uphold the conviction, on the grounds that the relevant article of the UCMJ only allowed jurisdiction in time of war. The CMA determined that the Vietnam War was not a congressionally declared war,⁷⁶⁷ and thus there was no jurisdiction under the UCMJ to try Avarette before a court-martial.

⁷⁶⁰ Even the Vietnam War was never a declared war by Congress.

⁷⁶¹ The cases of *Reid v Covert* and *Kinsella v Krueger* each involved a military spouse charged with a capital crime (murder) committed in the territory of a foreign U.S. base during peacetime; *supra* note 758.

⁷⁶² For more detailed description of the case history of extraterritorial jurisdiction over civilians since the UCMJ became law, see Perlak, *supra* note 755, pp. 96-98; Stein, *supra* note 756, pp. 582-593; M.S.S. Gibson, 'Lack of Extraterritorial Jurisdiction Over Civilians: A New Look at an Old Problem' (1995) 148 *Military Law Review* 114-185, pp. 126-136; R.O. Everett, 'Military Jurisdiction Over Civilians' (1960) 1960 *Duke Law Journal* 366-415.

⁷⁶³ *Kinsella v Singleton*, 361 U.S. 234 (1960).

⁷⁶⁴ Capital offence of premeditated murder committed in France: *Grisham v Hagan*, 361 U.S. 278 (1960). Non-capital offences: *McElroy v Guagliardo*, 361 U.S. 281 (1960).

⁷⁶⁵ *Latney v Ignatious*, 416 F.2d 821 (D.C. Cir. 1969).

⁷⁶⁶ *United States v Avarette*, 41 C.M.R. 363 (1970); 19 C.M.A. 363 (1970).

⁷⁶⁷ *Ibid.*, at 365.

Finally, in 2000, the Court of Appeals (Second Circuit) delivered its judgment in *United States v Gatlin*.⁷⁶⁸ This case dealt with a military spouse who had been convicted in a civilian District Court for sexual abuse of a minor that had been committed on property leased by the US Military in Germany. The case was heard in the District Court because the crime was not discovered until the defendant (and victim) was back in the US. The District Court determined that it had jurisdiction because the US military base in Germany was within the “special maritime and territorial jurisdiction of the United States”. However, the Court of Appeals disagreed, and held that this jurisdiction referred to in Title 18 of the US Code does not apply extraterritorially.⁷⁶⁹

The Court of Appeals felt that this was such an unfortunate situation (particularly considering the fact that Gatlin had pled guilty to the offence which was undeniable given the young girl gave birth to his child as proven by DNA testing) that it detailed the history of the jurisdictional gap in terms of the opportunities that the Legislative branch had had to fill the gap, finally taking the step to encourage Congress to fix the problem.⁷⁷⁰

Thus, the Supreme Court and other courts ensured there was a lacuna in the extraterritorial jurisdiction of the United States over its own nationals if they were civilians. Unless the civilians were accompanying the Armed Forces in wartime, they could not be tried for a crime under the UCMJ. Nor could they be tried for a crime under the US Code, because there was simply no general provision in US law for extraterritorial jurisdiction.

It was not until 2000 that a bill finally passed through Congress and sought to remedy the situation.

The Military Extraterritorial Jurisdiction Act of 2000 (MEJA)⁷⁷¹ specifically addresses the issue of

⁷⁶⁸ *United States v Gatlin*, *supra* note 756.

⁷⁶⁹ “In short, the legislative history of § 7(3) and its precursors demonstrates unequivocally that Congress, in fact, intended the statute to apply exclusively to the territorial United States. Accordingly, we conclude that Lincoln Village--where Gatlin's acts occurred--is not within the “special maritime and territorial jurisdiction of the United States”; that 18 U.S.C. § 2243(a) does not apply to Gatlin's acts; and that the District Court lacked jurisdiction to try him.” *Ibid.*, at 220.

⁷⁷⁰ “Finally, it clearly is within Congress's power to change the effect of this ruling by passing legislation to close the jurisdictional gap. It is for this reason that we have taken the unusual step of directing the Clerk of the Court to forward a copy of this opinion to the Chairmen of the Senate and House Armed Services and Judiciary Committees.” *Ibid.*, at 223.

⁷⁷¹ 18 U.S.C. §§ 3261-3267.

extraterritorial jurisdiction over civilians accompanying or employed by the armed forces outside the territory of the United States. It provides for US jurisdiction over “criminal offenses committed by certain members of the Armed Forces and by persons employed by or accompanying the Armed Forces outside the United States”.⁷⁷² These are criminal offences under the US Code, “punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States (1) while employed by or accompanying the Armed Forces outside the United States; or (2) while a member of the Armed Forces subject to chapter 47 of title 10”.⁷⁷³

The MEJA does not, however, strictly impose US jurisdiction in these circumstances. The Act specifically allows for jurisdiction to be exercised by a host country. Section 3263 states:

(a) Any person designated and authorized under section 3262(a) may deliver a person described in section 3261(a) to the appropriate authorities of a foreign country in which such person is alleged to have violated section 3261(a) if--

(1) appropriate authorities of that country request the delivery of the person to such country for trial for such conduct as an offense under the laws of that country; and

(2) the delivery of such person to that country is authorized by a treaty or other international agreement to which the United States is a party.

(b) The Secretary of Defense, in consultation with the Secretary of State, shall determine which officials of a foreign country constitute appropriate authorities for purposes of this section.

It is notable that the allowance for foreign jurisdiction is not without conditions, and in fact relies upon the authorities of the host country taking the initiative and making a request for the delivery of the person. Even then the delivery is not guaranteed, as the delivery must be allowed under any treaty or agreement, which means that the terms of a SOFA become particularly relevant. Even if delivery to foreign authorities were to be permissible under an agreement, the language states that a person *may* be delivered to foreign authorities. There is thus no obligation upon the US authorities to deliver a suspect to foreign authorities.

⁷⁷² § 3261.

⁷⁷³ *Ibid.* Subsection (a)(2) allows for prosecution of such categories of people as former members of the armed forces for crimes committed during service, as this was also formerly a gap in jurisdiction.

Despite being decades in the making, the MEJA nonetheless suffered from considerable deficiencies in the granting of jurisdiction.⁷⁷⁴ Several are discussed by Stein,⁷⁷⁵ but the most significant and the most relevant to jurisdiction over peacekeeping personnel is that jurisdiction in relation to civilian employees was only granted over those civilians who were employed by the Department of Defense (DoD), either directly or by a contractor with the DoD. The shortcomings of this section were discovered after the abuses at Abu Ghraib prison in Iraq were revealed. Civilian employees were working in Iraq through contracting firms that did not have contracts with the DoD, but with the Interior Department or the CIA.⁷⁷⁶ Thus, neither United States courts-martial nor federal civilian courts had the jurisdiction to prosecute these particular civilian offenders for their role in the Abu Ghraib abuses.

As a consequence, in late 2004, the MEJA was amended.⁷⁷⁷ The definition of a civilian employee now includes civilian employees, contractors or employees of contractors (or subcontractors) of “any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas”.⁷⁷⁸

Another amendment that has been made recently is the addition of ‘contingency operation’ to Article 2(a)(10).⁷⁷⁹ The term contingency operation is any military operation which the Secretary of Defense deems so, “in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force”.⁷⁸⁰ It can be reasonably surmised that this provision would apply to a PSO, during

⁷⁷⁴ M.G.R. Schmitt, 'Amending the Military Extraterritorial Jurisdiction Act of 2000: Rushing to Close an Unforeseen Loophole' (2005) *The Army Lawyer* 41-47; Stein, *supra* note 756, pp. 599-606.

⁷⁷⁵ *Ibid.*

⁷⁷⁶ Jennifer K. Elsea, CRS Report for Congress: *U.S. Treatment of Prisoners in Iraq: Selected Legal Issues*, (Congressional Research Service/The Library of Congress, 19 May 2005), <http://fpc.state.gov/documents/organization/44013.pdf>, at CRS-17- CRS-18.

⁷⁷⁷ See 108th Congressional Public Laws Documents and Records, Pub. L. 108-376, Title X, Sec. 1088 at www.govrecords.org/publ-108-376-to-protect-the-voting-rights-of-members-of-54.html.

⁷⁷⁸ 18 U.S.C. § 3267(1)(A).

⁷⁷⁹ Pub. L. 109-364 (2006) H.R.5122 John Warner National Defense Authorization Act for Fiscal Year 2007, SEC. 552. Clarification of Application of Uniform Code of Military Justice During a Time of War substituted “declared war or a contingency operation” in place of “war”.

⁷⁸⁰ 10 U.S.C. § 101(a)(13)(A). It also a military operation which “results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406

which members of the armed forces do or may become involved in military actions, operations or hostilities against an opposing military force.

Apart from this criminal jurisdiction, there is also jurisdiction over DoD civilians for war crimes. Title 18 of the US Code specifically states that a war crime can only be committed by (or against) a member of the Armed Forces or a national of the United States. As this title has express extraterritorial jurisdiction, covering the commission of a war crime “whether inside or outside the United States”, civilian peacekeeping personnel would be subject to United States jurisdiction for crimes committed under Title 18, section 2441.

Civilians are likewise subject to any provision of the US Code that has extraterritorial application. Any relevant provisions and their jurisdiction are detailed below.

4.3. Substantive Law Provisions

Once the first hurdle of establishing extra-territorial jurisdiction itself is overcome, the next one must be approached. A state must also have applicable substantive law provisions that are applicable extra-territorially. Without adequate substantive law provisions, a state will not be able to prosecute for specific crimes committed by its personnel. Many crimes have been presented through the conduct addressed in Chapters 2 and 3, namely sexual exploitation, rape, trafficking, sexual slavery, and prostitution-related activities, and every state needs to have the specific provisions outlawing such conduct in order to prosecute. However, the mere existence of a provision will not always guarantee a successful prosecution. Success is dependent on whether the provision is comprehensive. An inadequate definition may result in conduct falling outside the ambit of the law, and consequently an inability to prosecute. The presence and comprehensiveness of substantive law provisions in Australian and US law will be examined in this section.

of this title, chapter 15 of this title, or any other provision of law during a war or during a national emergency declared by the President or Congress”; 10 U.S.C. § 101(a)(13)(B).

4.3.1. Articles 133 and 134 of the US Uniform Code of Military Justice

Before the respective provisions of Australian and US substantive criminal law are compared and analysed, it is necessary to undertake an introduction to two unique articles found in the US UCMJ, Articles 133 and 134. The reason for this is that these two provisions are distinctly general, and can be used to prosecute crimes where no other provision provides for the proscription of certain conduct. The application of these articles to specific crimes will be addressed under the relevant crime sub-headings below.

4.3.1.1. Article 133 Conduct Unbecoming

Under Article 133 of the UCMJ, there is the ‘catch-all crime’⁷⁸¹ of “conduct unbecoming an officer and a gentleman”.⁷⁸² Certainly any of the gender-based crimes would fall within this broad category of crime; however it belittles the seriousness of these crimes to simply refer to them as “conduct unbecoming”. The vague, social characteristic of the description of this crime does not even give the impression that this kind of conduct may even be a crime at all, let alone a serious one.⁷⁸³

Yet the Supreme Court has firmly declared that Article 133 is not constitutionally void for vagueness,⁷⁸⁴ and thus remains a valid provision of the UCMJ. The text of the article is: “Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.” Indeed, the language of the article is anachronistic, drawing from the time in which the provision was first constructed several hundred years ago.⁷⁸⁵

⁷⁸¹ The Court of Appeals termed art. 133 and art. 134 “an unwritten criminal code, a catchall receptacle... these articles also have the very real capacity for arbitrary and discriminatory enforcement”. *Levy v Parker*, 478 F.2d 772, at 790-92. This decision was overturned by the Supreme Court, *see infra* note 784.

⁷⁸² 10 U.S.C. § 933. Art. 133.

⁷⁸³ It has been criticised for its vagueness in this respect, especially for the fact that it could lead to arbitrary application. *See* J.M. Kamman, 'Parker v Levy- Conduct Unbecoming an Officer and a Gentleman' (1974-1975) 2 *Pepperdine Law Review* 435-444, pp.444; 435, fn. 5.

⁷⁸⁴ *Parker v Levy* 417 U.S. 733 (1974).

⁷⁸⁵ The history of the provision goes as far back as the Article of War of James II in 1688. *See* Kamman, *supra* note 783, pp. 435-6. Nelson traces it back further to the Code of Chivalry in the time of William the Conqueror. *See* K.E. Nelson, 'Conduct Expected of an Officer and a Gentleman: Ambiguity' (1970) 12 (2) *U.S. A.F. JAG Law Review* 124-141, pp.126-130.

The Manual for Courts-Martial offers the following definition of the offence:

b. *Elements.*

- (1) That the accused did or omitted to do certain acts; and
- (2) That, under the circumstances, these acts or omissions constituted conduct unbecoming an officer and gentleman.

c. *Explanation.*

(1) *Gentleman.* As used in this article, “gentleman” includes both male and female commissioned officers, cadets, and midshipmen.

(2) *Nature of offense.* Conduct violative of this article is action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, seriously compromises the officer’s character as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person’s standing as an officer. There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, or cruelty. Not everyone is or can be expected to meet unrealistically high moral standards, but there is a limit of tolerance based on customs of the service and military necessity below which the personal standards of an officer, cadet, or midshipman cannot fall without seriously compromising the person’s standing as an officer, cadet, or midshipman or the person’s character as a gentleman. This article prohibits conduct by a commissioned officer, cadet, or midshipman which, taking all the circumstances into consideration, is thus compromising. This article includes acts made punishable by any other article, provided these acts amount to conduct unbecoming an officer and a gentleman...

(3) *Examples of offenses.* Instances of violation of this article include... public association with known prostitutes; committing or attempting to commit a crime involving moral turpitude...⁷⁸⁶

Not only is the language obsolete, but it is highly gendered,⁷⁸⁷ by the use of the word ‘gentleman’.

The military has attempted to ‘de-gender’ the word by offering the explanation that “[a]s used in this article, “gentleman” includes both male and female commissioned officers, cadets, and

⁷⁸⁶ R.C.M. 59.b.-c. Other examples provided are: knowingly making a false official statement; dishonorable failure to pay a debt; cheating on an exam; opening and reading a letter of another without authority; using insulting or defamatory language to another officer in that officer’s presence or about that officer to other military persons; being drunk and disorderly in a public place;... and failing without good cause to support the officer’s family.

⁷⁸⁷ K. de Jong, ‘On Equality and Language’ (1985) 1 *Canadian Journal of Women and Law* 119-133; L.M. Finley, ‘Breaking Women’s Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning’ (1989) 64 *Notre Dame Law Review* 886-910.

midshipmen".⁷⁸⁸ Yet if both male and female commissioned officers, cadets, and midshipmen are subject to this provision, a re-wording of the provision would be pertinent.

Feminist activists in the United States have been among the most prominent, if not the most prominent, in campaigning for non-gendered law.⁷⁸⁹ It is testimony to the dominance of men within the military⁷⁹⁰ that a law so gendered in its wording has not been changed to gender-neutral terminology. Indeed, the concept of a society that is structured so that men are 'gentlemen' and women are subservient is the very antithesis of the feminist movement at all levels. What is sought is a society where respect and fair treatment is conferred regardless of gender.

Taking into account the gendered perspective, 'gentleman' is a term that no longer has relevance in today's society, particularly in a legislative provision. The Oxford Dictionary⁷⁹¹ has several definitions of 'gentleman', including "[a] man of gentle birth, or having the same heraldic status as those of gentle birth; properly, one who is entitled to bear arms, though not ranking among the nobility, but also applied to a person of distinction without precise definition of rank". This definition is specifically referred to as "[n]ow chiefly Hist[orical]". Likewise, "[u]sed (with more or less of its literal meaning) as a complimentary designation of a member of certain societies or professions" is termed "obs[olete] in ordinary use". Conceivably, the meaning most relevant to Article 133 would be "a man in whom gentle birth is accompanied by appropriate qualities and behaviour; hence, in general, a man of chivalrous instincts and fine feelings".

The military seeks such an article in the UCMJ for the purposes of upholding the discipline and image of the military, as well as ensuring that only a certain standard of person is suitable for the armed forces. This is not an unreasonable expectation. The offence could be reworded to reflect this without using the word 'gentleman'. Instead, the provision could simply make reference to 'conduct

⁷⁸⁸ Manual for Courts Martial, *supra* note 52, at IV-94 R.C.M. 59.c.(1).

⁷⁸⁹ See e.g. C.A. MacKinnon, *Feminism Unmodified*, (Harvard University Press, Cambridge, Mass., London 1987); M. Minow, 'Justice Engendered' (1987) 101 *Harvard Law Review* 10-95.

⁷⁹⁰ For discussions on this, see e.g. C. Enloe, *Does Khaki Become You? The Militarization of Women's Lives*, First ed., (South End Press, London 1983).

⁷⁹¹ See *Oxford English Dictionary* online, (Oxford University Press, Oxford, 2006), at <http://dictionary.oed.com/>.

unbecoming an officer’, and remove all references to the word ‘gentleman’ in the definitions. This wording would still capture the intention of the provision- that is, to instil the requirement of a certain standard of behaviour by commissioned officers, cadets, and midshipmen. The type of appropriate conduct is well expressed in a 1964 decision of the Court of Military Appeals: “the necessary attributes of character, honesty, integrity, and fair dealing [are] to be expected of an officer”.⁷⁹²

Article 133 is a very particular example of military-specific crimes that restrict behaviour in public and private life. This restriction of an officer’s private life has been endorsed by military courts. The Court of Military Appeals has held that “an officer on active duty is not a civilian and his off-duty activities do not fall outside the orbit of Article 133”.⁷⁹³

4.3.1.2. Article 134 the General Article

Another possible provision that could be applied to unlisted crimes is the General Article, Article 134, which proscribes

“...all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty...”⁷⁹⁴

As with Article 133, the General Article has also been unsuccessfully challenged for vagueness.⁷⁹⁵ The offence is explained in the Manual for Courts-Martial, and in some ways is similar to Article 133:

“b. *Elements.* The proof required for conviction of an offense under Article 134 depends upon the nature of the misconduct charged. If the conduct is punished as a crime or offense not capital, the proof must establish every element of the crime or offense as required by the applicable law. If the conduct is punished as a disorder or neglect to the prejudice of good order and discipline in the armed forces, or of a nature to bring discredit upon the armed forces, then the following proof is required:

(1) That the accused did or failed to do certain acts; and

⁷⁹² *United States v Giordano*, 15 U.S.C.MA 163, 35 CMR 135 (1964) at 141.

⁷⁹³ *United States v Howe*, 37 CMR 429 (1967) at 442.

⁷⁹⁴ 10 U.S.C. § 934, Art. 134.

⁷⁹⁵ *Parker v Levy*, *supra* note 784.

(2) That, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces."⁷⁹⁶

The Manual goes on to list specific crimes that can be charged under Article 134. This list is not exhaustive, and other crimes may fall within the ambit of the General Article. Some of the relevant crimes listed include adultery, wrongful cohabitation, kidnapping, and pandering and prostitution. As with Article 133, there are crimes listed here that impose quite a restriction on the private life of military personnel, and would certainly not be found in civil criminal law. Again, this demonstrates the special nature of military discipline and the military community as a whole.⁷⁹⁷ "In military life there is a higher code termed honor, which holds its society to stricter accountability; and it is not desirable that the standard of the Army shall come down to the requirements of a [civilian] criminal code."⁷⁹⁸

⁷⁹⁶ R.C.M. 60.c.(1)-(3).

"c. Explanation.

(1) In general. Article 134 makes punishable acts in three categories of offenses not specifically covered in any other article of the code. These are referred to as "clauses 1, 2, and 3" of Article 134. Clause 1 offenses involve disorders and neglects to the prejudice of good order and discipline in the armed forces. Clause 2 offenses involve conduct of a nature to bring discredit upon the armed forces. Clause 3 offenses involve noncapital crimes or offenses which violate Federal law... If any conduct of this nature is specifically made punishable by another article of the code, it must be charged as a violation of that article...

(2) Disorders and neglects to the prejudice of good order and discipline in the armed forces (clause 1).

(a) To the prejudice of good order and discipline. "To the prejudice of good order and discipline" refers only to acts directly prejudicial to good order and discipline and not to acts which are prejudicial only in a remote or indirect sense. Almost any irregular or improper act on the part of a member of the military service could be regarded as prejudicial in some indirect or remote sense; however, this article does not include these distant effects. It is confined to cases in which the prejudice is reasonably direct and palpable. An act in violation of a local civil law or of a foreign law may be punished if it constitutes a disorder or neglect to the prejudice of good order and discipline in the armed forces...

(b) Breach of custom of the service. A breach of a custom of the service may result in a violation of clause 1 of Article 134. In its legal sense, "custom" means more than a method of procedure or a mode of conduct or behavior which is merely of frequent or usual occurrence. Custom arises out of long established practices which by common usage have attained the force of law in the military or other community affected by them. No custom may be contrary to existing law or regulation. A custom which has not been adopted by existing statute or regulation ceases to exist when its observance has been generally abandoned. Many customs of the service are now set forth in regulations of the various armed forces. Violations of these customs should be charged under Article 92 as violations of the regulations in which they appear if the regulation is punitive...

(3) *Conduct of a nature to bring discredit upon the armed forces (clause 2)*. "Discredit" means to injure the reputation of. This clause of Article 134 makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem. Acts in violation of a local civil law or a foreign law may be punished if they are of a nature to bring discredit upon the armed forces..."

⁷⁹⁷ See *supra* Military is a 'special community'.

⁷⁹⁸ *Parker v Levy*, *supra* note 784, at 765.

In general, conduct engaged in, such as sexual exploitation, trafficking and sexual slavery could all be prosecuted under the General Article, as it is all conduct bringing discredit upon the armed forces and prejudice good order and discipline. Prior cases in these categories have included convictions for sexual intercourse in the presence of another and a man dressing in women's clothing.⁷⁹⁹

4.3.2. Prostitution-related Conduct

In Australian law, there are no offences under the DFDA or the federal *Criminal Code Act* covering prostitution-related conduct. In the ACT, prostitution is legalised. Consequently, under ACT law there are specific offences under the *Prostitution Act*, but the acts of pandering, procurement and prostitution are not criminal offences.⁸⁰⁰ Under the *Prostitution Act*, prostitution is defined as "the provision of commercial sexual services", which in turn are defined as "sexual services provided for monetary consideration or any other form of consideration or material reward (regardless of whether the consideration or reward is, or is to be, paid or given to the prostitute or another person)".⁸⁰¹ Potentially relevant offences under the *Prostitution Act* are duress, soliciting, causing a child to provide commercial sexual services, and proceeds of child prostitution.

The crime of duress is that of forced prostitution. The provision prohibits a person from inducing a person to provide or to continue to provide commercial sexual services through intimidation, assault, or the threat of assault of any person; or the supply or offer to supply a drug of dependence to any person; or by making a false representation or otherwise act fraudulently.⁸⁰² The offence also proscribes the intimidation, assault or threat of assault of a person; or the supply or offer to supply a drug of dependence to a person, "for the purpose of inducing any person to provide or continue to provide him or her with payment derived, directly or indirectly, from the provision of commercial sexual services".⁸⁰³ The US UCMJ also contains the crime of forced prostitution through recent amendments. The provision is termed forcible pandering, and proscribes compelling another person

⁷⁹⁹ *United States v Tollinchi*, 54 M.J. 80 (2000); and *United States v Guerrero*, 31 M.J. 692 (N.M.C.M.R. 1990).

⁸⁰⁰ *Prostitution Act* (ACT) 1992.

⁸⁰¹ *Prostitution Act*, Notes- Dictionary.

⁸⁰² Part 3- Offences, s. 17(1).

⁸⁰³ Part 3- Offences, s. 17(2).

to engage in an act of prostitution with another person to be directed to said person.⁸⁰⁴ This is a much shorter provision than that found in the ACT Prostitution Act, which, as discussed above, expressly lists the circumstances under which forced prostitution is committed, including intimidation, assault and fraud. The UCMJ provision simply states ‘compels’, however this does not necessarily mean that it is a more restrictive definition. It would enable both the prosecutor and the court to adopt a broader interpretation and include methods such as fraud within the definition of ‘compels’.

There are more offences under the ACT *Prostitution Act*. It is prohibited to accost any person, or solicit or loiter, for the purpose of offering or procuring commercial sexual services, in a public place.⁸⁰⁵ This provision is in keeping with the legalised nature of prostitution under the ACT law, which permits prostitution only in brothels located in prescribed locations, but not street prostitution. The offence of soliciting also outlaws accosting a child in a public place for the purpose of offering or procuring commercial sex services, with a maximum penalty of 3 years imprisonment.⁸⁰⁶

Offences related to child prostitution proscribe the causing, permitting, offering or procurement of a child to provide commercial sexual services.⁸⁰⁷ Maximum penalties vary according to the age of the child, with 15 years imprisonment for a child under 12 years, and 10 years imprisonment for a child over the age of 12. It is also prohibited for a person to receive payment the person “knows, or could reasonably be expected to have known, is derived, directly or indirectly, from commercial sexual services provided by a child”.⁸⁰⁸

Thus, while the provision and the procurement of commercial sex services are legal activities, it is not legal to force someone through duress to engage in such conduct. This covers involvement in forced prostitution but leaves a lacuna in the ability to hold Australian personnel criminally responsible for

⁸⁰⁴ 10 U.S.C. § 920. Art. 120(1).

⁸⁰⁵ *Prostitution Act (ACT)*, Part 3- Offences, s. 19(1).

⁸⁰⁶ Part 3- Offences, s. 19(2).

⁸⁰⁷ Part 3- Offences, s. 20.

⁸⁰⁸ Part 3- Offences, s. 21.

patronising a prostitute while deployed on a mission. Military personnel could be charged under the DFDA with the offence of ‘prejudicial conduct’, which states that a “defence member is guilty of an offence if the member engages in conduct that is likely to prejudice the discipline of, or bring discredit on, the Defence Force”.⁸⁰⁹ This is a broad provision similar to the General Article of the US UCMJ. It could easily be argued that patronising prostitutes may prejudice the discipline of the ADF, and certainly that the behaviour brings discredit on the ADF. Another possible offence is disobeying a lawful command. If the ADF issues a command to all deployed personnel that they are not to patronise prostitutes or visit brothels, and an off-limits list as part of that command directive; or alternatively issues a command that PSO-wide off-limits lists must be adhered to, violation of such order would be an offence under s. 27A of the DFDA.

It would be useful for the Australian legislature to look to the US UCMJ for guidance with regards the outlawing of prostitution-related conduct. It is only recently that the UCMJ Article 134 has been amended to criminalise patronising a prostitute. However, military courts have nonetheless previously assessed the issue under both Article 133 and Article 134.

4.3.2.1. Article 133

The ‘conduct unbecoming’ provision could be an effective provision to use as a deterrent for officers engaging in such behaviour as visiting strip clubs and brothels. It seems that this kind of behaviour is indeed what the provision was intended for- given that example offences include “public association with known prostitutes; [and] committing or attempting to commit a crime involving moral turpitude”.

The offence of ‘public association with known prostitutes’ is somewhat outdated. The original text was ‘public association with notorious prostitutes’, and ‘notoriety’ was an essential element of the offence.⁸¹⁰ In a 1954 case, the military Board of Review upheld this offence, stating that:

⁸⁰⁹ DFDA, s. 60.

⁸¹⁰ Nelson, *supra* note 785, pp. 124 and 136, citing the 1969 Manual for Courts-Martial.

“It is our opinion that the word ‘notorious’ alleges an essential element of the offense. Paragraph 212, *Manual for Courts-Martial*, 1951, in listing public association with a notorious prostitute as an instance of conduct unbecoming to an officer, restates a time honoured proposition of military law that an allegation of notoriety is vital to set forth the offense of public association with a prostitute... The discredit to the military service resulting from such conduct arises from the unfavorable reaction upon those observers of the association who are aware of the unsavory character and reputation of the accused’s companion. In the instant case the court having excepted the word ‘notorious’ from the specification of which they found the accused guilty and having failed to substitute an allegation from which the notoriety of the prostitute may be inferred... an offense cognizable under the Uniform Code of Military Justice has not been made out.”⁸¹¹

The prostitute in question no longer has to be ‘notorious’, only ‘known’. Thus the standard to be proven is even lower. That is, while ‘notorious’ may simply mean “well or widely known”, it is more regularly given an extremely negative connotation: “Well known on account of something which is not generally approved of or admired; unfavourably known; noted for some bad practice, quality, etc”.⁸¹² It is a positive development that the word ‘notorious’ has been removed. However the current wording of the offence implies that simply to be a prostitute constitutes an element of the offence- unless of course, this fact is kept secret.

What precisely is meant by ‘association’ is questionable. While it should be an offence for military personnel to engage the services of a prostitute, or to use sex services in general, the wording of this offence sustains the negative image of prostitutes that has endured through the years.⁸¹³ Prostitutes have been regularly stigmatised, and this offence under Article 133 insinuates that mere association with a (‘known’) prostitute is an act of ‘indecentcy’ or ‘indecorum’. It thus prohibits an officer even being friends with someone who is a prostitute- unless no one is aware that the person is a prostitute. What the offence should address is the act of engaging the services of a prostitute in any

⁸¹¹ *United States v Mallory*, CM 374664, 17 CMR 409 (1954) at 410.

⁸¹² *Oxford English Dictionary Online*, 2006, www.oed.com.

⁸¹³ B. Cooper, 'Prostitution: A Feminist Analysis' (1989) 11 *Women's Rights Law Reporter* 99-119, p. 102. The image of woman is often perpetuated as either ‘Madonna or Whore’. This is referred to in many different terms, but refers to the ‘good girl/bad girl’ dichotomy- that a woman is either the ‘good girl’ i.e. marriageable, pure, etc; or a ‘bad girl’ i.e. sexualised and dirty. Overall provides the example ‘comparison’ of feminists and prostitutes presented as a representation of this image; C. Overall, 'What's Wrong With Prostitution? Evaluating Sex Work' (1992) 17 (4) *Signs* 705-724, p. 705.

manner, or patronising brothels, not associating with a prostitute.⁸¹⁴ This would result in a reduction in demand for prostitution.

There have been few cases dealing with this crime under Article 133, however one from 1954 is directly relevant, and an encouraging precedent.⁸¹⁵ The accused Rice was convicted of, among other offences, violating a lawful general order by being in a house of prostitution, and of wrongfully entering an 'off-limits' area, under Articles 92,⁸¹⁶ 133 and 134 of the UCMJ. At the time of the offence, Rice was a member of the United Nations mission in Korea. The area in question was "located in a general area where prostitutes are known to reside... As a consequence, an "Off Limits" sign had been posted in the vicinity of this building..."⁸¹⁷ In fact, it was specifically forbidden for UN personnel to enter a brothel:

The following types of establishments, buildings, and areas are 'Off Limits' to all United Nations personnel of this command (except ROKA):

1. Houses of prostitution;
2. Indigenous eating and drinking establishments;
4. Korean private homes.

The establishments, buildings, and areas enumerated above, will be treated as 'Off Limits' whether or not posted as such.⁸¹⁸

Expressly rendering houses of prostitution off limits is evidence that, even in 1954, use of the services of prostitutes by UN personnel was unacceptable. This seems to have been taken seriously, as "the house was located in an area notorious for the activities of prostitutes and duly designated as an "off-limits" are, both by numerous signs posted throughout the village and by a circular

⁸¹⁴ However, *see infra* for discussion of developments.

⁸¹⁵ *United States v Rice*, 14 CMR 316 (1954).

⁸¹⁶ 10 U.S.C. § 892. Art. 92. *Failure to obey order or regulation*

Any person subject to this chapter who—

(1) violates or fails to obey any lawful general order or regulation;
(2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or
(3) is derelict in the performance of his duties;
shall be punished as a court-martial may direct.

⁸¹⁷ *Rice*, at 319.

⁸¹⁸ *Ibid.*, citing Circular 36 promulgated by Headquarters 7th Infantry Division on 21 July 1953.

conspicuously posted at the central source of information for the accused's unit".⁸¹⁹ Thus, not only were personnel informed of buildings and areas that were off limits, but these areas were specifically signposted in order to ensure knowledge of the off limits status of these areas.

Further, the designation of places such as "Indigenous eating and drinking establishments" and "Korean private homes" as off limits is in keeping with and assists to uphold the UN Code of Conduct, which forbids exploitation of the local population.⁸²⁰ This avoids situations of unequal relationships of any kind, but particularly ones involving receipt of sexual favours in return for such items as food or money.

The court found that Rice had gone to the house in question with the specific intent of engaging in sexual intercourse, and thus was guilty of violating Articles 133 and 134.⁸²¹ This was despite the fact that the accused did not actually end up engaging in sexual intercourse with the woman.⁸²² Nor was notoriety at issue in the case. In fact, the case distinctively centred on the behaviour of the accused and the inappropriateness of that behaviour, rather than any 'notoriety' of the prostitute. Thus, there is a clear precedent for using Articles 133 and 134 to prosecute personnel for going to a house of prostitution, whether they engage in the services offered or not.

A more recent case, *United States v Guaglione*, distinguished itself from *Rice*, and held that the appellant's visit to a house of prostitution was not conduct unbecoming an officer.⁸²³ The Court of Military Appeals made the differentiation based on the fact that Guaglione had not intended to engage in sexual intercourse, and that the area was not designated as off limits.⁸²⁴ In fact, the case reinforces the image of the military as a 'boys' club', where this behaviour is acceptable:

"Appellant's battery and battalion commanders testified that his conduct in visiting the houses of prostitution had displayed "poor judgment" but had not demeaned him as an officer. The

⁸¹⁹ *Rice*, at 319.

⁸²⁰ However, it is not clear in the sources available whether preventing exploitation was the basis of the regulations that designated these areas as off-limits.

⁸²¹ *Rice*, at 319.

⁸²² The Military Police arrived before this could take place. Rice's jeep driver who had accompanied him had already engaged in intercourse with another woman.

⁸²³ *United States v Guaglione*, 27 M.J. 268 (1988). No reference is made in the judgment to 'gentleman'.

⁸²⁴ *Ibid.*, at 270.

battalion commander, Lieutenant Colonel Leverett, an officer of some 23 years' military service, refused to describe appellant's conduct as "unbecoming" despite trial counsel's repeated attempts to so characterize it during cross-examination. Also, the former first sergeant of the battery to which Guaglione was assigned testified that, on the basis of his own experience and knowledge of the customs and standards of the Army, appellant's act was only "[p]oor judgment." This witness had served in the Army for 27 years at the time of trial.

"The Government's only rebuttal witness was the brigade commander, Colonel A. W. Schulz. Testifying in response to a hypothetical question based on the facts of this case, he stated on direct examination, "I do not believe the conduct is acceptable." When asked whether the visit to the house of prostitution "rises to the level . . . that would disgrace him as an officer," he responded, "I think it comes very close. It might be very, very poor judgment and it is [sic] certainly borderlines on conduct unbecoming."⁸²⁵

The Court did not simply dismiss the charges, and did state that: "In determining whether Guaglione's visit to the house of prostitution constituted such conduct, we accept the premise that a commissioned officer may be held to a higher standard of accountability for his conduct than an enlisted member or a civilian."⁸²⁶ However, the Court then went on to emphasise that "not every delict or misstep warrants punishment under Article 133. In general, it must be so disgraceful as to render an officer unfit for service".⁸²⁷ This is extremely dubious reasoning, as since the 1960s, it is no longer the case that a conviction for conduct unbecoming must result in dismissal from service. This raises the standard of behaviour that constitutes conduct unbecoming too high. It echoes the reasoning of why the mandatory punishment of dismissal was removed in the first place- that is, "the existence of the mandatory penalty sometimes encouraged court members to vote for an acquittal rather than a conviction".⁸²⁸

The Court concluded that the conviction for conduct unbecoming could not stand because Guaglione did not participate in any sexual activity or encourage any of the enlisted members to do so. This was combined with the fact that "no American commander had attempted to prohibit American servicemembers from entering these brothels by declaring them off-limits; and they were lawful

⁸²⁵ *Ibid.*, at 270-271.

⁸²⁶ *Ibid.*, at 271.

⁸²⁷ *Ibid.*

⁸²⁸ Nelson, *supra* note 785, p. 130, citing the Report to Honorable Wilber M. Brucker, Secretary of the Army, by the Committee on the UCMJ, Good Order and Discipline in the Army, 18 January 1960, at 14.

under German law”.⁸²⁹ In fact, this case offers a completely contrary view towards prostitution to the encouraging one delivered by the Court in *Rice*.

“We do not conclude, however, that “public association” within the contemplation of the Manual occurs when a young officer not in uniform merely walks through a German “red-light district” or even enters a house of prostitution. For one thing, “public” denotes something that is open or generally known... and Guaglione's activity in Frankfurt on September 6 was not either generally known at the outset or intended to be generally known. More importantly, we do not believe that ogling the wares in a brothel constitutes “association”; instead, the contact must be physical or, if not physical, must be continued over a substantial period of time.

“We recognize that an officer's conduct may be “unbecoming” for purposes of Article 133 even though it is private and even though it may not violate some other punitive article. *United States v. Norvell*, 26 MJ 477 (CMA 1988). However, the disgraceful aspect of the “association with known prostitutes” is apparently that it is “public” and so represents an open flouting of community morals. Here, Guaglione's conduct was quite lawful insofar as the local community was concerned.”⁸³⁰

Again, the standards set in this case are too high. The requirement that behaviour, to qualify as ‘association’, must be physical contact, or continued contact over a period of time (i.e. regular patronage), precludes the possibility of prosecuting personnel who visit a brothel without engaging in sexual activities. This indicates that it is only an offence when committed over a long period of time, or if sexual activity is engaged in, and ignores the fact that one visit is just as unacceptable as several, even if sexual activity is not engaged in. Any and all visits by PSO personnel to brothels or strip clubs are unacceptable. Such visits can (and have) encourage(d) the proliferation of these clubs, which can (and has) in turn result(ed) in a significant increase in the trafficking of women and girls.⁸³¹

The Court’s reasoning in relation to private/public behaviour is likewise dubious. Whether prostitution is legal in the territory in question should be irrelevant. If PSO personnel are under the jurisdiction of the sending state, it should be the behaviour of the military personnel that is prohibited through the laws of the sending state. This decision flagrantly ignores the reasoning in

⁸²⁹ *Guaglione*, at 271.

⁸³⁰ *Guaglione*, at 272.

⁸³¹ See discussion *supra* Chapter 2.

Howe that “an officer on active duty is not a civilian and his off-duty activities do not fall outside the orbit of Article 133”.⁸³² As can be seen in the above citation, the Court even mentions that private behaviour may be restricted, but dismisses this without adequate discussion.⁸³³ The interpretation is further complicated by the idea that there must be physical contact- in this case, sexual activity- and it must be in public. Sexual activity engaged in inside a brothel itself is not public, but the entering of the brothel is.

The Court’s use of local community morals as the standard is also inappropriate. Applying this standard by which to judge whether behaviour is acceptable or not would result in confusion as to what is conduct unbecoming and what is not. PSOs take place in many different locations around the world, and local ‘community morals’ will differ from place to place. One standard should be set, quite simply that visiting houses of prostitution is unacceptable and falls directly within the ambit of Articles 133 and 134.

All in all, *Guaglione* is a disappointing case with flawed reasoning that ignores precedential case law. It delivers the impression that visiting houses of prostitution is acceptable.

However, a case from 1999 demonstrates progression from the *Guaglione* decision. In *United States v Major Johnnie Hargrove, Jr.*, Hargrove was convicted under Article 133 for charging “\$6,000.00 to his government credit card for ‘adult entertainment services’ including live sex shows, pornographic movies, striptease shows, and prostitutes at an adult club in the red light district of Rotterdam”.⁸³⁴ It is unclear from the decision whether the conviction was based solely on the fact that he misused government funds for these purposes, or a combination of the misappropriation and the fact of visiting these services. The misuse of funds is a crime, but neither should it be appropriate for personnel to frequent sex shows (etc.), even if these services are provided legally in the relevant territory, as they are in the Netherlands.

⁸³² *Howe*, *supra* note 793.

⁸³³ *Supra* note 830.

⁸³⁴ *United States v Major Johnnie Hargrove, Jr.*, ARMY 9701151, US Army Court of Criminal Appeals, 19 April 1999, at <http://www.jagcnet.army.mil/ACCA>.

While restricting the movement and behaviour of military personnel may seem to violate the freedom of personnel, particularly when off-duty and also in a situation where such services are legally provided,⁸³⁵ the outlawing of this behaviour will uphold both the image of integrity that the military evidently endeavours to convey, and the actual personal integrity of its personnel. This integrity would thus include a general respect towards women in that payment for sexual services of any kind is unacceptable.

4.3.2.2. Article 134

Article 134 encompasses the crimes of pandering and prostitution. The text of the elements of the crime of pandering and prostitution demonstrate that these crimes do not target the buyer of sexual services. Pandering is ‘pimping’, and prostitution is defined as having sexual intercourse with another person not the accused’s spouse “for the purpose of *receiving* money or other compensation”.⁸³⁶ Pandering attracts a maximum punishment of confinement for five years, and prostitution for one year. Despite the specific wording of the crime of prostitution limiting the application to those involved in the transaction who receive the money or other compensation, the interpretation of prostitution in case law seems to indicate that the buyer can also be prosecuted. In the case of *Miller*, the accused was charged with pandering, for offering women money or cigarettes if they would have sexual intercourse with him.⁸³⁷ The Court of Appeals for the Armed Forces held that the act of pandering must involve a third party and that with only two parties, the act amounts to solicitation of another to commit prostitution. Hence the accused was found guilty of solicitation to commit prostitution, or “wrongfully enticing a female to engage in a sexual act for hire and reward”. This seems to indicate that although the text of Article 134 outlining the elements of prostitution implicates only the prostitute can commit the crime, the courts are willing to use the General Article to convict the buyer of sexual services. In fact, in *Miller*, there is no indication that an exchange of

⁸³⁵ See discussion *supra* Military is a ‘special community’.

⁸³⁶ R.C.M. 97.b.(b). Emphasis added.

⁸³⁷ *United States v Miller*, 47 M.J. 352 (1997).

sexual services was engaged in, only solicitation to commit prostitution, and this was enough for a conviction.

Pandering could certainly be used to prosecute PSO personnel who compel, induce, entice or procure an act of prostitution or who arrange or receive consideration for arranging sexual intercourse or sodomy for another person.⁸³⁸ This is also directly linked to trafficking and sexual slavery, as many of the women involved in this kind of transaction in post-conflict societies are trafficked.⁸³⁹

In late 2005, the Manual for Courts-Martial was amended to include the crime of patronising a prostitute.⁸⁴⁰ The new crime falls under Article 134:

“(b)(2) Patronizing a prostitute.

(a) That the accused had sexual intercourse with another person not the accused’s spouse;

(b) That the accused compelled, induced, enticed, or procured such person to engage in an act of sexual intercourse in exchange for money or other compensation; and

(c) That this act was wrongful; and

(d) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.”

The only shortcoming of the provision is that it only refers to ‘sexual intercourse’, rather than sexual activity in general. This is essentially a loophole, enabling an accused to proffer the argument that they engaged only in oral sex, and not intercourse, and thus their behaviour does not fall under the definition of patronising a prostitute. There is also the possibility of the accused arguing that they did not compel, induce, entice, or procure the other person to engage in an act of sexual intercourse in exchange for money or other compensation- rather, they offered the money or other compensation (such as food) after the act of intercourse. A simpler definition would have removed all these elements and simply prohibited the exchange of sexual services for money or other compensation.

⁸³⁸ R.C.M. 97.b.(2)-(3).

⁸³⁹ See *supra* Chapter 2.

⁸⁴⁰ Amendment to Sec. 3 Part IV, ¶ 97, Article 134- (Pandering and prostitution). Amended by Executive Order 13387-2005, Amendments to the Manual for Courts-Martial, October 18, 2005, 70 Fed. Reg. 60701. Manual for Courts-Martial (2008 Edition), ¶97(b)(2).

This amendment is an extremely positive step forward. It offers recognition that criminalisation of military personnel patronising a prostitute is an appropriate response towards solving the problem. The existence of such a provision sets an excellent example for other states such as Australia to follow in amending their own national legislation. The lack of provisions outlawing prostitution-related activities in the Australian legislation is a significant void. The legalisation of prostitution in the Australian Capital Territory should not be a reason for the acceptance of prostitution-related activities by Australian Defence Force military and civilian personnel when engaged in a peace operation outside of Australia. It would be appropriate for the DFDA to be amended to include the crimes of pandering and patronising a prostitute. The latter could be a straight-forward provision outlawing ‘the exchange of sexual activities or services for monetary or other compensation’. This broadly encompasses any form of sexual activity without limiting it to sexual intercourse, and also ensures there is no need to prove anything beyond the fact of the exchange such as whether the exchange was compelled, induced, enticed or procured. Likewise, while the new UCMJ provision is very favourable, an amendment to ensure the definition is not as limited would be pragmatic and beneficial.

4.3.3. Sexual exploitation

There is a clear lack of provisions proscribing sexual exploitation in both Australian and US law. Turning to existing Australian provisions, there are some crimes under both federal and ACT law that could possibly be used to prosecute sexual exploitation.

One set of crimes that could be used are those covering sexual offences against children overseas. These provisions were enacted to deal with the problem of sex tourism, in which people travel overseas to engage in sexual activities with children- conduct which is sexual exploitation. Australian law comprehensively has a whole part of the *Crimes Act* (Cth) 1914 dedicated to sexual offences against children overseas. Part IIIA of the *Crimes Act* deals with crimes of child sex committed by Australian citizens, residents and body corporates committed outside the territory of Australia. It

criminalises sexual offences against children overseas,⁸⁴¹ and covers sexual intercourse with a child under 16, inducing a child under 16 to engage in sexual intercourse, sexual conduct involving a child under 16, and inducing a child under 16 to be involved in sexual conduct.⁸⁴² All offences are absolute liability offences, although this is contradicted by the available defence of mistaken belief about the age of the child.⁸⁴³ There is no requirement to prove special intent that the accused travelled overseas for the purposes of engaging in child sex, only that it took place. These provisions could be very effective in prosecuting peacekeeping personnel who engage in this behaviour. The legislative provisions are broad, covering not only sexual intercourse, but all sexual conduct with a child under 16. It is often the case that peacekeepers engaging in sexual exploitation or abuse do so with a child.⁸⁴⁴

Child sexual offences are also found in the ACT *Crimes Act*. It is an offence under the ACT *Crimes Act* to engage in sexual intercourse with a person who is under the age of 16 years.⁸⁴⁵ Further, it is proscribed for an adult to maintain a sexual relationship with a young person (under the age of 16 years), which involves engaging in a sexual act with the young person on three or more occasions.⁸⁴⁶

Offences of acts of indecency are also prohibited by the ACT *Crimes Act*.⁸⁴⁷ There is no definition provided for the term 'act of indecency', which leaves it open to broad interpretation, and one which could certainly include sexual exploitation. The individual commission or commission in company of another of an act of indecency on, or in the presence of, another person without the consent of that person and with the knowledge the other person does not consent is a punishable offence.⁸⁴⁸ There are a further three levels of acts of indecency- the infliction of grievous bodily harm, the infliction of

⁸⁴¹ Part IIIA, Division 2- Sexual offences against children overseas.

⁸⁴² Part IIIA, Division 2, ss. 50BA- 50BD respectively.

⁸⁴³ Division 3- Defences, s. 50CA, defence based on belief about age.

⁸⁴⁴ P. Higate, 'Peacekeepers and Gender: DRC and Sierra Leone', *Pambazuka News*, (8 July 2004), <http://www.pambazuka.org/#2>, p. 3; 'From Camp to Community: Liberia study on exploitation of children' (Save the Children UK, Monrovia, 8 May 2006) ; E. Schade, 'Experiences with regard to The United Nations Peace-Keeping Forces in Mozambique' (International Save the Children Alliance, Barrio, 20 November 1995) ; 'Note for Implementing and Operation Partners on Sexual Violence and Exploitation: The Experience of Refugee Children in Guinea, Liberia and Sierra Leone' (UNHCR and Save the Children UK, February 2002)

⁸⁴⁵ S. 55.

⁸⁴⁶ S. 56.

⁸⁴⁷ Ss. 57-61.

⁸⁴⁸ S. 60.

actual bodily harm, and the unlawful assault or threat of grievous or actual bodily harm, on another person with intent to commit an act of indecency. The commission of an act of indecency on, or in the presence of, a person under the age of 16 years, is a separate offence attracting a higher maximum imprisonment.⁸⁴⁹

Like Australia, the United States does not have any law covering sexual exploitation. The military law provision in Article 134 criminalising patronising a prostitute could effectively be used to prosecute personnel for sexual exploitation. While the crime is titled patronising a *prostitute*, the definition of patronising is broad enough to cover sexual exploitation, particularly given that it involves sexual intercourse with a person, and “the accused compel[ing], induc[ing], entic[ing], or procure[ing] such person to engage in an act of sexual intercourse in exchange for money or other compensation”. The definition does not actually require the other person to be classified by definition as a commercial sex worker, thus enabling any situation involving the compulsion, inducement, enticement or procurement of someone to engage in sexual intercourse in exchange for money or other compensation to be covered by this provision.

This does not discount the need for a separate provision prohibiting sexual exploitation. The shortcomings of the provision could be adequately covered by a separate provision dealing with sexual exploitation. Aspects of the two crimes differ, and especially important is the emphasis on abuse of power involved in sexual exploitation.

Other misconduct listed under the General Article could potentially be used to prosecute sexual exploitation. While it is an outdated provision, adultery could be used, if the accused engaged in sexual intercourse while they or the other person were married to someone else.⁸⁵⁰ Adultery is in fact an oft-prosecuted provision of the UCMJ.⁸⁵¹

⁸⁴⁹ All *Crimes Act* (ACT) sexual offences relating to young persons have a higher maximum punishment for commission on or with a young person below the age of 10 years.

⁸⁵⁰ MCM 2008, ¶62.

⁸⁵¹ “Despite its controversial nature... between 1992 and 1996 over 858 servicemembers were charged with having committed adultery.” M.J. Davidson, *A Guide to Military Criminal Law*, (Naval Institute Press, Annapolis, Maryland 1999), p. 87.

If the situation is one where the accused is living with a local woman, who in fact consents to the relationship, the accused could possibly be charged with wrongful cohabitation.⁸⁵² However this crime requires that the accused and the other person “openly and publicly live together as husband and wife, holding themselves out as such”, although they are in fact not married. Thus, if the accused and the other person do not hold themselves to be husband and wife, the elements of wrongful cohabitation would not be satisfied.

Another potential crime is that of ‘indecent act’, which proscribes engaging in indecent conduct.⁸⁵³ Indecent conduct in this context is defined as “that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations.”⁸⁵⁴ While the definition provides that indecent conduct includes observing, videoing or photographing another person without their consent whilst engaged in a sexual act, this does not preclude a decision that any gender-based crime could fall within the general definition, including the propositioning for an exchange of sex for money, food or other compensation.

At the least, in keeping with codes of conduct, orders should be issued which prohibit PSO personnel from adopting relationships of cohabitation with members of the local community, and any violation of the order could then be prosecuted under Article 92. It may be argued that this would prevent genuine relationships from developing.⁸⁵⁵ However, it would simply be unrealistic to apply a system in which relationships were to be analysed on a case-by-case basis to determine their authentic as opposed to exploitative status. This would involve unrealistic use of resources. It would also be difficult to determine- what would be the criteria set in order to determine if a relationship was indeed genuine for both parties? It would not be realistic, for example, to expect a peacekeeper in

⁸⁵² MCM 2008, ¶69.

⁸⁵³ 10 U.S.C. § 920. Art. 120(k).

⁸⁵⁴ 10 U.S.C. § 920. Art. 120(t)(12). The use of the terms ‘immorality’ and ‘morals’ is not appropriate for a legal provision, as they are not legal terms, rather they are value terms that cannot be definitively defined in a legal sense.

⁸⁵⁵ Or indeed, that some relationships of cohabitation may not be related to romantic/sexual attachments and may only be a case of house sharing. Yet it is not to say that house sharing would also not involve exploitation of locals, or at the very least unequal relationships.

the early stages of a relationship to declare commitment to move to the host country to live with their partner, or to bring the partner with them back to their home country. Thus, applying this prohibition of relationships of cohabitation as a blanket rule would be the only realistic solution.

Should the sexual exploitation be engaged in under circumstances of force or violence, provisions such as aggravated sexual assault,⁸⁵⁶ aggravated sexual contact,⁸⁵⁷ abusive sexual contact,⁸⁵⁸ or wrongful sexual contact could be used for prosecution. Sexual contact is defined as

“the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person, or intentionally causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person.”⁸⁵⁹

Of these four provisions, only wrongful sexual contact contains lack of consent as an element.⁸⁶⁰

Wrongful sexual contact is sexual contact without the other person’s permission. The other provisions require the elements of force, grievous bodily harm, or threats.

As regards children specifically, there are several express provisions: rape of a child (a sexual act with a child under 12; or a sexual act committed using force, grievous bodily harm or threats against a child who has attained the age of 12 but not 16; or a sexual act committed on an intoxicated or unconscious child who has attained the age of 12 but not 16);⁸⁶¹ aggravated sexual assault of a child (a sexual act with a child who has attained the age of 12 but not 16);⁸⁶² aggravated sexual abuse of a child (a lewd act with a child);⁸⁶³ aggravated sexual contact with a child (sexual contact with a

⁸⁵⁶ 10 U.S.C. § 920. Art. 120(c).

⁸⁵⁷ 10 U.S.C. § 920. Art. 120(e).

⁸⁵⁸ 10 U.S.C. § 920. Art. 120(h).

⁸⁵⁹ 10 U.S.C. § 920. Art. 120(t)(2).

⁸⁶⁰ See discussion *infra* on consent in Consent.

⁸⁶¹ 10 U.S.C. § 920. Art. 120(b).

⁸⁶² 10 U.S.C. § 920. Art. 120(d).

⁸⁶³ 10 U.S.C. § 920. Art. 120(f). A lewd act is: “(A) the intentional touching, not through the clothing, of the genitalia of another person, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person; or (B) intentionally causing another person to touch, not through the clothing, the genitalia of any person with an intent to abuse, humiliate or degrade any person, or to arouse or gratify the sexual desire of any person.” 10 U.S.C. § 920. Art. 120(t)(10).

child);⁸⁶⁴ abusive sexual contact with a child (sexual contact with a child who has attained the age of 12 but not 16);⁸⁶⁵ indecent liberty with a child (engaging in indecent liberty in the physical presence of a child).⁸⁶⁶ Indecent liberty means indecent conduct, but physical contact is not required.⁸⁶⁷ Depending on the level of sexual activity engaged in, one of these provisions could be used for prosecuting US personnel for sexual exploitation of a child. Aside from the UCMJ, the US Code contains the specific crime of sexual exploitation and other abuse of children, which is a crime over which the US has extraterritorial jurisdiction.⁸⁶⁸

The issuance of an order proscribing sexual exploitation, including a clear definition, would be one method of both states solving the current lack of express provisions covering sexual exploitation. Violation of the order could be prosecuted under s. 27A of the DFDA (for Australians) or Article 92 (for US personnel). Both states could also prosecute for 'prejudicial conduct' (DFDA s. 60) or for 'conduct to the prejudice of good order and discipline' (the General Article of the UCMJ).

While several potentially applicable offences in both jurisdictions have been discussed, an express provision criminalising sexual exploitation would enable prosecution for such an offence. It is clear that there are provisions in both states proscribing child sex offences, but nothing that could really be used effectively to prosecute for sexual exploitation of an adult. While act of indecency/indecent acts may be used to prosecute a peacekeeper, such a crime does not really cover the serious nature of sexual exploitation, and certainly does not emphasise the elements such as the abuse of the power differential involved in sexual exploitation.

4.3.4. Rape

Under Australian law, the ACT *Crimes Act* prohibits sexual intercourse without consent of the other person and with recklessness to the consent of the other person, committed either as an individual

⁸⁶⁴ 10 U.S.C. § 920. Art. 120(g).

⁸⁶⁵ 10 U.S.C. § 920. Art. 120(i).

⁸⁶⁶ 10 U.S.C. § 920. Art. 120(j).

⁸⁶⁷ 10 U.S.C. § 920. Art. 120(t)(11).

⁸⁶⁸ Chapter 110 of Title 18, §§ 2251-2260.

or acting in company with any other person.⁸⁶⁹ The element of recklessness is proven by knowledge of lack of consent or by recklessness as to lack of consent.⁸⁷⁰

The rape provision of the US UCMJ has recently been amended.⁸⁷¹ The provision now outlaws additional offences other than rape, such as sexual assault and other sexual misconduct (which are addressed elsewhere in this chapter where relevant). The amended provision now proscribes rape as:

“Any person subject to this chapter who causes another person of any age to engage in a sexual act by-

- (1) using force against that other person;
- (2) causing grievous bodily harm to any person;
- (3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;
- (4) rendering another person unconscious; or
- (5) administering to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby substantially impairs the ability of that other person to appraise or control conduct.”⁸⁷²

The difference between the two provisions is substantial in several different elements- the conduct required to fulfil the definition, consent, and the conduct covered with regards to force and threats.

4.3.4.1. Conduct Covered

The ACT *Crimes Act* defines sexual intercourse as:

“(a) the penetration, to any extent, of the vagina or anus of a person by any part of the body of another person, except if that penetration is carried out for a proper medical purpose or is otherwise authorised by law; or

(b) the penetration, to any extent, of the vagina or anus of a person by an object, being penetration carried out by another person, except if that penetration is carried out for a proper medical purpose or is otherwise authorised by law; or

⁸⁶⁹ S. 54.

⁸⁷⁰ S. 54(3).

⁸⁷¹ National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3136 (2006). The amended provision came into effect on 1 October 2007.

⁸⁷² 10 U.S.C. § 920. Art. 120(a).

- (c) the introduction of any part of the penis of a person into the mouth of another person;
- or
- (d) cunnilingus; or
- (e) the continuation of sexual intercourse as defined in paragraph (a), (b), (c) or (d).⁸⁷³

This definition is broad. It does not narrow rape to the penetration of the vagina by a penis, rather criminalising both female and male rape, when conducted by any body part or object. It also moves away from using the term rape, instead using the phrasing ‘sexual intercourse without consent’ which enables a conviction to be included under this category for engaging in non-consensual oral sex, which would otherwise be prosecuted as sexual assault. Sub-section (e) covers the situation where a person has initially consented to sexual intercourse, but then changes their mind during the intercourse and wants to stop, but the other person continues engaging in the intercourse, no longer with the consent of the first person.

In stark contrast, the definition of ‘sexual act’ under the UCMJ is extremely limited:

“The term ‘sexual act’ means--

- (A) contact between the penis and the vulva, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; or
- (B) the penetration, however slight, of the genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.”⁸⁷⁴

The first constraint is that the definition covers only female vaginal rape- or more specifically, vulva rape. Sub-article (A) clearly states that only penetration of the vulva by a penis is rape. The use of the term ‘vulva’ in itself is unusual, given that the vulva refers only to the external female genitalia, most of which cannot actually be penetrated. However, as ‘vulva’ includes the vaginal vestibule, or the opening of the vagina, this does still cover vaginal penetration. In phrasing this sub-article, it would have been better to refer expressly to vaginal penetration, and also not to define ‘contact’ as

⁸⁷³ S. 50.

⁸⁷⁴ 10 U.S.C. § 920. Art. 120(t)(1).

‘penetration’, as contact between the penis and the vulva would not necessarily be actual penetration (and would thus fall under the definition of ‘sexual contact’).

In a further exclusion of male rape in the provision, sub-paragraph (B) refers only to the genitalia. Beyond the basic medical definition that genitalia are the reproductive sex organs only, it can be assumed that the reference to “the genital opening” in (B) does not include the anus, as elsewhere in the definitions under Article 120, genitalia and the anus are listed separately.⁸⁷⁵

The provision excludes oral sex and male rape from the definition of rape, probably due to the fact that both oral sex and anal sex fall under the definition of the UCMJ crime of sodomy.⁸⁷⁶ However, the crimes under sodomy do not cover non-consensual oral sex or anal sex, but any instance of such behaviour, even if engaged in consensually. Thus, prosecuting anal rape or forced oral sex would only be done under the crime of sodomy, which would not emphasise the fact that it was non-consensual. Non-consensual oral sex could also be prosecuted under aggravated sexual contact or abusive sexual contact.⁸⁷⁷

Sub-article (B) contains further limitations. The penetration of the genital opening by a hand or finger is prohibited, but a much more effective wording would have been to prohibit the penetration by any part of the body, which would have avoided any loopholes that may be argued when other body parts are used to penetrate. It is excellent that the sub-article includes penetration with any object as rape. However, this sub-article includes a significant circumscription in the fact that it has an element of special intent: the penetration must be committed with the “intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person”. This is a very unusual element of the crime of rape, and may well result in difficulty in successful prosecutions under this sub-paragraph, given the fact that the prosecution will have to prove such intent. Intent is not always openly expressed, and while it may be inferred from the circumstances, it may still be formidable to prove.

⁸⁷⁵ 10 U.S.C. § 920. Art. 120(t)(11) and (12).

⁸⁷⁶ 10 U.S.C. § 925. Art. 125.

⁸⁷⁷ 10 U.S.C. § 920. Art. 120(e) and (h).

4.3.4.2. Consent

The Australian law bases the crime of rape on lack of consent; whereas consent is not a factor in the UCMJ provision. This is contrary to developments in international criminal law, where emphasis has been on lack of consent (or coercion) as the primary element of rape. The wording of the UCMJ provision prior to amendment was the commission of “an act of sexual intercourse by force and without consent”.⁸⁷⁸ Thus the interpretation of rape, although maintaining force as a necessary element of rape, has required lack of consent as an element. This has been the case even after the enactment of the new amendment, with regard to a case on appeal regarding events that took place prior to the amendment. A 2008 judgment held the essential elements of rape to be that the accused committed an act of sexual intercourse, and that the act of sexual intercourse was done by force and without consent.⁸⁷⁹ The US Court of Appeals for the Armed Forces referred to many other cases, affirming the need for force and lack of consent. However the case law was pointing towards a definition that preferred lack of consent as the main element of rape. A 2005 case recognised that “the essence of” rape “remains the same- sexual intercourse against the will of the victim”.⁸⁸⁰ One court in fact recommended amending the statute to base the crime of rape solely on consent, indicating that rape is a violation of sexual autonomy.⁸⁸¹

This recommendation was unfortunately not taken up, and consent is, instead, now an affirmative defence⁸⁸² to the crimes of rape, aggravated sexual assault, aggravated sexual contacts and abusive sexual contact.⁸⁸³ Consent is defined as

“words or overt acts indicating a freely given agreement to the sexual conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the accused's use of

⁸⁷⁸ Manual for Courts-Martial (2005 Edition), ¶45(a)(a).

⁸⁷⁹ *United States v Bright* 66 MJ 359 (2008).

⁸⁸⁰ *United States v Leak*, 61 MJ 234 (2005) at 239 and 246.

⁸⁸¹ *United States v Webster*, 37 MJ 670 at 675.

⁸⁸² “The term ‘affirmative defense’ means any special defense which, although not denying that the accused committed the objective acts constituting the offense charged, denies, wholly, or partially, criminal responsibility for those acts. The accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden, the prosecution shall have the burden of proving beyond a reasonable doubt that the affirmative defense did not exist.” 10 U.S.C. § 920. Art. 120(t)(16).

⁸⁸³ 10 U.S.C. § 920. Art. 120(r).

force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating relationship by itself or the manner of dress of the person involved with the accused in the sexual conduct at issue shall not constitute consent.”⁸⁸⁴

Further, consent cannot be given by a person under the age of 16, or by someone who is substantially incapable of appraising the nature of the sexual conduct at issue due to mental impairment or unconsciousness resulting from consumption of alcohol or drugs, or due to mental disease or defect; or who is substantially incapable of physically declining participation in the sexual conduct or physically communicating their unwillingness to participate.⁸⁸⁵

In a similar manner, the ACT *Crimes Act* contains an extensive list of situations where consent is expressly considered to be negated, some of which cover the same situations as the UCMJ provisions, but many are different. Consent is negated when the consent is caused:

- “(a) by the infliction of violence or force on the person, or on a third person who is present or nearby; or
- (b) by a threat to inflict violence or force on the person, or on a third person who is present or nearby; or
- (c) by a threat to inflict violence or force on, or to use extortion against, the person or another person; or
- (d) by a threat to publicly humiliate or disgrace, or to physically or mentally harass, the person or another person; or
- (e) by the effect of intoxicating liquor, a drug or an anaesthetic; or
- (f) by a mistaken belief as to the identity of that other person; or
- (g) by a fraudulent misrepresentation of any fact made by the other person, or by a third person to the knowledge of the other person; or
- (h) by the abuse by the other person of his or her position of authority over, or professional or other trust in relation to, the person; or
- (i) by the person's physical helplessness or mental incapacity to understand the nature of the act in relation to which the consent is given; or

⁸⁸⁴ 10 U.S.C. § 920. Art. 120(t)(14).

⁸⁸⁵ *Ibid.*

(j) by the unlawful detention of the person.”⁸⁸⁶

As with the UCMJ, it is also stated that lack of physical resistance shall not be regarded as consenting to the sexual intercourse. Sub-sections (c), (d), (f), (g), (h) and (j) are all situations or include elements not provided for by the UCMJ. Of particular interest and relevance to rape committed by a peacekeeper is sub-section (h), which negates consent through abuse of authority over, or professional or other trust in relation to the other person. In the wording of this, direct echoes of the UN definition of sexual exploitation can be recognised. This would in fact enable any peacekeeper who engages in sexual intercourse as defined under the ACT *Crimes Act*, with a local woman or girl, to be prosecuted for rape, as it can be shown to be an abuse of his position of authority or trust in relation to that woman or girl.

4.3.4.3. Force and Threats

Prior to the adoption of the new UCMJ provision, force in US military rape law had been categorised in case law as actual force or constructive force.⁸⁸⁷ Actual force is physical force used to overcome a victim’s lack of consent, and requires more than incidental force involved in penetration.⁸⁸⁸ Constructive force does not require physical force; it may consist of expressed or implied threats of bodily harm, and may be demonstrated by proof of a coercive atmosphere that includes threats to injure others or statements that resistance would be futile.⁸⁸⁹

There is a new definition of force in the statute:

“The term ‘force’ means action to compel submission of another or to overcome or prevent another's resistance by--

(A) the use or display of a dangerous weapon or object;

(B) the suggestion of possession of a dangerous weapon or object that is used in a manner to cause another to believe it is a dangerous weapon or object; or

⁸⁸⁶ S. 67.

⁸⁸⁷ *United States v Terry*, 64 MJ 295 (2006); *United States v Leak*, 61 MJ 234 (2005); *United States v Simpson*, 58 MJ 368 (2003).

⁸⁸⁸ *Ibid.*

⁸⁸⁹ *Ibid.*

(C) physical violence, strength, power, or restraint applied to another person, sufficient that the other person could not avoid or escape the sexual conduct.”

While this definition does not include the concept of constructive force, such a concept is covered by the rape provision itself, under Article 120(a)(3) and (5), stating that a sexual act engaged in by placing the other person in fear that any person will be subjected to death, grievous bodily harm or kidnapping, or by threat of force to administer a drug or intoxicant, constitutes rape. However, this is still more limited than the open-ended definition of constructive force adopted by the courts. The statute definition, for example, requires threats of grievous bodily harm, whereas the courts defined constructive force as including threats of bodily harm of any kind.

As seen above under the discussion of consent, the ACT Crimes Act has a different emphasis on force and threats, given that they are not an element of the crime of rape itself, but rather a definitive method of negating consent, the lack of which is a principal element of sexual intercourse without consent. Consent is negated by the infliction of, or the threat of infliction of, violence or force on the person or on a third person. Violence and force are not defined, and it is likely the court would take a broad view of what behaviour would constitute such terms. For example, while there is no mention of ‘the use or display of a dangerous weapon or object’ as found in the UCMJ definition of force, it would be presumable for the court to deem this situation as violence or force. The ACT *Crimes Act* goes further, and also includes the use of extortion as a means of negating consent, as well as the threat to publicly humiliate or disgrace, or to physically or mentally harass, the person or another person.

Overall, there is little in common between the Australian and the US provisions on rape. Only force and vaginal penetration remain a common element, and even these are not dealt with in the same manner. The Australian law is much more in line with the direction of international legal definitions of rape, with a broad definition that emphasises lack of consent as the principal element. Progressive movement away from the element of force and towards the element of coercion or lack of consent

has been visible in national⁸⁹⁰ and international jurisdictions⁸⁹¹ for some time now, and it is surprising that the US did not follow this, particularly when its own military courts were advocating the change to the element of lack of consent.⁸⁹² The new US UCMJ provision also encompasses many circumscriptions such as seen in the discussion of conduct covered under the definition of rape. This reveals that not all states have appropriate or adequate legislative provisions dealing with the most basic sexual offence of rape, and some guidance is needed in order to ensure legislative provisions are all-inclusive.

4.3.5. HIV/AIDS-related offences

In national law, one area that may prove to be useful to prosecute peacekeepers for sexual offences is that of HIV/AIDS-related offences. It has been shown in Chapter 2 that victims of rape, sexual slavery, sexual exploitation, prostitution, and trafficking are at high risk of contracting HIV (a violation of their right to health and even right to life). Both Australia and the US have military policies aiming to prevent HIV transmission, as well as criminal provisions providing for prosecution of various forms of conduct leading to the transmission of HIV, although each state approaches these provisions from a different perspective. Australian law focuses on endangerment to life, assault and possibly manslaughter, and has prostitution-related provisions. US law fixates on strictly military crimes of violation of an order or the General Article. Neither state has an offence expressly outlawing the transmission of HIV (or any other infectious disease) under circumstances of intent or negligence.

4.3.5.1. Australia

Upon application to the ADF, all new recruits are required to undertake vigorous health tests. If a recruit is found to be HIV positive, they are not to be enlisted or appointed to the ADF.⁸⁹³ This policy has been challenged in the High Court of Australia (HCA) as discriminatory, but the HCA determined

⁸⁹⁰ See discussion in K. Burgess-Jackson, *Rape: A Philosophical Investigation*, (Dartmouth, Aldershot 1996), Chapter 6 Consent, Force, and Coercion, pp. 91-106.

⁸⁹¹ See e.g. *Prosecutor v Akayesu*, ICTR-96-4-T, para. 688.

⁸⁹² *Supra* notes 173, 174 and 175.

⁸⁹³ ADF Head Defence Health Services, Health Directive No 210, Amendment No 3, *Policy on the Prevention, Detection and Management of Blood Borne Virus Infection*, 13 June 2007, para. 45. The viruses covered by this policy are HIV, and Hepatitis B and C.

that it was within the power of the Commonwealth to discriminate against a person with HIV based on the need to ensure a safe working environment for all ADF personnel.⁸⁹⁴ That is, “the inherent requirements of the employment of a soldier go beyond the physical capacity to perform the tasks or skills of a soldier”, and that the health and safety risk to other soldiers or employees was a legitimate reason for the rejection of HIV positive persons from ADF employment.⁸⁹⁵ However, the policy of immediate dismissal does not apply to members already serving who are subsequently diagnosed with HIV, although these members are considered non-deployable.⁸⁹⁶ The ADF has an extensive policy relating to ‘the Prevention, Detection and Management of Blood Borne Virus Infection’, one of the aims of which is “the prevention of infection with blood borne viruses”.⁸⁹⁷ The policy includes provisions for pre- and post-deployment testing. Such a policy indicates that the ADF recognises the importance of avoiding the possible spread of HIV/AIDS, and the role of the ADF in such avoidance, particularly in consideration of the higher risk of transmission when serving in particular overseas deployments.⁸⁹⁸ This indicates an attitude that would encompass willingness to prosecute personnel for HIV/AIDS-related crimes committed whilst on deployment to a PSO, where the legislative means exists.

Aside from ADF policies, there are also relevant legislative provisions that deal with aspects of HIV/AIDS transmission. The ACT *Prostitution Act* outlaws the provision or receipt of commercial sexual services at a brothel or elsewhere, “if the person knows, or could reasonably be expected to know, that he or she is infected with a sexually transmitted disease”.⁸⁹⁹ This crime only attracts a maximum penalty of 6 months, which is a relatively low punishment for an offence which may ultimately result in the death of the victim.

⁸⁹⁴ *X v The Commonwealth* [1999] HCA 63; 200 CLR 177; 167 ALR 529; 74 ALJR 176 (2 December 1999).

⁸⁹⁵ Per McHugh J at para. 30.

⁸⁹⁶ Health Directive No 210, *supra* note 893, paras. 40-44.

⁸⁹⁷ *Ibid.*, para. 4(b).

⁸⁹⁸ *Ibid.*, para. 3: “ADF personnel deploy to areas where the community prevalence of infection with these viruses is often higher than in Australia.”

⁸⁹⁹ *Prostitution Act*, Part 3- Offences, s. 25.

It is also an offence under the *Prostitution Act* for a person, at a brothel or elsewhere, to “provide or receive commercial sexual services that involve vaginal, oral or anal penetration by any means unless a prophylactic is used”.⁹⁰⁰ It is further prohibited to misuse, damage or interfere with the efficacy of any prophylactic used, or to continue to use a prophylactic with the knowledge, or reasonable expectation of knowledge, that it is damaged.⁹⁰¹

Apart from these crimes, there are no express transmission offences found in ACT or federal law. Hence, the potential applicability of other crimes to the transmission of HIV/AIDS through sexual activity must be examined. Potentially applicable crimes to consider are murder, manslaughter, assault, and conduct endangering life or health, under the ACT *Crimes Act*.

Could a peacekeeper be charged with murder for infecting a local woman with HIV who subsequently died? It is ultimately, highly unlikely. The principal obstacle is that the crime of murder requires intent to cause the death of the victim.⁹⁰² Hence, intent must be proven, and it is most improbable that a member of a peace support operation would intend to kill someone by engaging in sexual activity in order to infect the other person with HIV. The crime of reckless murder is a more plausible option, as the offence is committed with reckless indifference to the probability of causing the death of the person.⁹⁰³ However, again, there are significant barriers to proving this crime. Proof of actual foresight that death will be caused is required, and knowledge that it is merely possible that death will occur is insufficient.⁹⁰⁴ Of course, the main element of the crime of murder is the death of the victim, and in the case of HIV/AIDS, this will usually take years to occur. It would also be very difficult to prove that it was in fact the accused peacekeeper that was the source of the infection in the victim- a fact that could only be verified if the victim had been tested before the sexual contact and with the exploration of other potential sources of infection.

⁹⁰⁰ Part 3- Offences, s.27(3).

⁹⁰¹ Part 3- Offences, s.27(4).

⁹⁰² *Crimes Act* (ACT), s. 12(1)(a).

⁹⁰³ S. 12(1)(b).

⁹⁰⁴ *R v Crabbe* (1985) 156 CLR 464; *Royall v R* (1991) 172 CLR 378.

The latter two problems also arise in proving manslaughter; however upon death other aspects of manslaughter would be far easier to apply. It may be arguable that the infection of another person with HIV through sexual activity (particularly when the conduct in question is a crime itself, such as rape or sexual exploitation), may be regarded as manslaughter by an unlawful and dangerous act; manslaughter by a negligent act; or manslaughter by omission.⁹⁰⁵ The latter category could apply to a peacekeeper for failing to take necessary precautions to prevent transmission during sexual activity. Manslaughter by unlawful and dangerous act must be proved by showing the degree of danger is an objectively appreciable risk of serious injury.⁹⁰⁶ For negligent manslaughter, proof of a very high degree of negligence must be produced; that is, 'gross', 'wicked' or 'culpable' negligence, a gross departure from the appropriate standard of care.⁹⁰⁷

It is clear that charging a peacekeeper with murder or even manslaughter for the death of a local woman from AIDS contracted from the peacekeeper through sexual contact would be highly problematic to prove, particularly as the behaviour does not really fall within the definition of those crimes. However, in a Canadian case currently before the courts, the defendant is charged with two counts of first degree murder and 13 counts of aggravated sexual assault for engaging in unprotected sex when aware of his HIV status.⁹⁰⁸ The charges of murder relate to two women who died as a result of AIDS after contracting HIV from the defendant.

Assault would also be a difficult crime to apply to the transmission of HIV through sexual activity. Assault must result in harm to the victim, and the victim cannot consent to the assault. Common assault requires proof of intent to assault, or at a minimum recklessness as to the risk of harm or interference with the victim.⁹⁰⁹ Assault occasioning actual bodily harm requires an actual application

⁹⁰⁵ J. Godwin, et al., *Australian HIV/AIDS Legal Guide*, 2nd ed., (The Federation Press, Leichhardt 1993), p. 50.

⁹⁰⁶ *Wilson v R* (1992) 174 CLR 313.

⁹⁰⁷ *R v Taktak* (1988) 14 NSWLR 226; 41 A Crim R 349; *Nydam v R* [1990] VR 430 at 445.

⁹⁰⁸ *R v Aziga* [2006] OJ No 4545 (QL); *R v Aziga* [2006] OJ No 5232 (QL). Further procedural judgements: *R. v. Aziga*, 2007 CanLII 249 (ON S.C.); *R. v. Aziga*, 2007 CanLII 56095 (ON S.C.); *R. v. Aziga*, 2008 CanLII 29780 (ON S.C.); *R. v. Aziga*, 2008 CanLII 39222 (ON S.C.); *R. v. Aziga*, 2008 CanLII 39612 (ON S.C.); *R. v. Aziga*, 2008 CanLII 53841 (ON S.C.); *R. v. Aziga*, 2008 CanLII 60336 (ON S.C.); *R. v. Aziga*, 2008 CanLII 66631 (ON S.C.).

⁹⁰⁹ S. 26. *Vallance v R* (1961) 108 CLR 56.

of force. Consensual sexual intercourse itself is not intrinsically harmful. Due to the element of intent, it would be difficult to prove the contraction of HIV by a person through consensual sexual activity as assault;⁹¹⁰ however it would not be impossible.

The most likely crimes that could be applied to this situation under the ACT *Crimes Act* are the offences of conduct endangering life, and conduct endangering health.⁹¹¹ Yet what amounts to conduct endangering life or health must be examined. The ACT legislation is significantly more restrictive than other Australian state legislation prohibiting endangerment of life.⁹¹² Only the conduct specifically detailed in the ACT provision is considered to be conduct endangering life. The only category that HIV transmission through sexual activity may fall into would be under s. 27(3)(b): “intentionally and unlawfully... administers to, or causes to be taken by, another person any stupefying or overpowering drug or poison or any other injurious substance likely to endanger human life or cause a person grievous bodily harm”. From this, it would have to be argued that the HIV-positive body fluids exchanged in the sexual encounter amount to “any other injurious substance”. No definition is provided in the legislation, which would certainly leave the matter open to interpretation that the fluids do amount to an injurious substance.

Acts endangering health likewise include the intentional and unlawful administration to or causing to be taken by, another person an injurious substance. However, the act must be done “with intent to injure or cause pain or discomfort to” the victim. Such intent would be difficult to prove in the situation of a peacekeeper engaging in sexual activity in relation to HIV transmission, even if the sexual activity was not consensual.

There have been successful prosecutions for HIV transmission through unprotected sex under charges such as aggravated assault and endangering life, both in Australia and in other jurisdictions.

⁹¹⁰ Godwin, *supra* note 905, pp. 51-53.

⁹¹¹ *Crimes Act* (ACT), ss. 27 and 28.

⁹¹² E.g. *Crimes Act* (Vic) 1958 has the broad offence of “recklessly engage[ing] in conduct that places or may place another person in danger of death”. Two prostitutes were charged with this offence in 1991, for engaging in prostitution while infected with HIV. The charges were only dropped when evidence of absence of safe sex methods was lacking. Godwin, *supra* note 905, p. 55.

While such cases are not required to be applied in a prosecution under the ACT law, they could be referred to for precedential value in support of using such offences to prosecute HIV transmission via unprotected sex, which could be used to prosecute ADF personnel for such conduct.

In the South Australian case of *R v Parenzee*,⁹¹³ the defendant was convicted of three counts of endangering life after engaging in unprotected sexual intercourse with three women when he knew was infected with HIV, knowing that the act or acts of unprotected sexual intercourse were likely to endanger the life of the woman, either intending to endanger her life or being recklessly indifferent to whether he life was endangered. However, the provision under which Parenzee was convicted is far broader than that in the ACT *Crimes Act*. Parenzee was convicted under s. 29(1) of the *Criminal Law Consolidation Act* (SA);⁹¹⁴ the offence of endangering life or creating risk of serious harm is fulfilled “Where a person, without lawful excuse, does an act or makes an omission (a) knowing that the act or omission is likely to endanger the life of another; and (b) intending to endanger the life of another or being recklessly indifferent as to whether the life of another is endangered”. It is evident that this is a provision which leaves open the interpretation of what act or omission may be committed to be considered an endangerment to life, unlike the restrictive listing in the ACT *Crimes Act*. Other cases of HIV transmission through unprotected sex have been successfully prosecuted in Victoria under conduct endangering serious injury, which again is a broadly worded provision.⁹¹⁵

A Canadian case which could be referred to is that of *R v Ssenyonga*,⁹¹⁶ in which the accused was charged with “a number of criminal offences, including aggravated sexual assault, criminal negligence, administering noxious bodily fluids, and nuisance endangering the life of another, for allegedly having had unprotected sexual intercourse with a number of women while knowing that he

⁹¹³ *R v Parenzee* [2006] SASC 127 (2 May 2006); *R v Parenzee* (2007) 248 LSJS 99; *R v Parenzee* [2007] SASC 143 (27 April 2007); *R v Parenzee* [2007] SASC 316 (24 August 2007).

⁹¹⁴ *Criminal Law Consolidation Act* (SA) 1935.

⁹¹⁵ *Crimes Act* (Vic) 1958, s. 23 Conduct endangering persons “A person who, without lawful excuse, recklessly engages in conduct that places or may place another person in danger of serious injury is guilty of an indictable offence.”

⁹¹⁶ *R v Ssenyonga* (1992) 73 CCC (3-d) 216 (Ont Ct, Prov Div). See also *Ontario (Chief Medical Officer of Health) v. Ssenyonga*, [1991] O.J. No. 554 (Gen. Div.), in which an application by the Ontario Chief Medical Officer for an order restraining Ssenyonga from engaging in certain sexual acts due to his suffering from AIDS, pursuant to section 101 of the *Health Protection and Promotion Act*, 1983 of Ontario was granted.

was infected with HIV, which resulted in transmission of HIV to three women”.⁹¹⁷ Despite acknowledgement that the HIV-infected semen was a ‘noxious thing’, the charge of administering noxious bodily fluids was dropped because the intention of endangering life or causing bodily harm was not present.⁹¹⁸ Other charges were also dropped for various reasons, and the remaining charges were not brought to trial before the death of the accused. Other cases, however, have already been successful in the prosecution of aggravated sexual assault due to transmission through unprotected sex.⁹¹⁹

In another Canadian case, the defendant was convicted of aggravated assault and public nuisance for the transmission of HIV through unprotected sex to the complainant. On appeal, the Court of Appeal changed the aggravated assault conviction to one of attempted aggravated assault, and affirmed the conviction for public nuisance.⁹²⁰ In Appeal Justice Welsh’s opinion, the fact that the complainant may have contracted HIV during the intercourse engaged in with the defendant prior to the defendant finding out his serostatus was the reason for dismissing the charge of aggravated assault and substituting it with attempted aggravated assault.⁹²¹ The Court held that the assault had to be applied without the consent of the complainant, and determined that the complainant’s consent to the sexual intercourse was vitiated by the defendant’s fraud, as “consent obtained by fraud is not valid consent”.⁹²² It was found that the complainant would not have consented to unprotected intercourse had she been aware that the defendant was HIV-positive.⁹²³ The charge of public nuisance was upheld because the defendant’s actions had put at risk not only other partners with whom the victim had gone on to engage in sexual intercourse with, but also a wider group of people

⁹¹⁷ *Canadian HIV/AIDS Policy and Law Newsletter*, Vol. 2, No. 2, January 1996, p. 26.

⁹¹⁸ *Ibid.*, p. 27.

⁹¹⁹ *R v Walkem*, [2007] OJ No 186 (Westlaw); *R v D(N)*, [2006] JE 2006-273; [2006] CarswellQue 19.

⁹²⁰ *Williams v R*, 2001 NFCA 52; (2001), 158 CCC (3d) 523. *See also R v Cuerrir*, [1998] 2 SCR 371.

⁹²¹ *Williams*, Paras 59-61; 72; 75; 78.

⁹²² Paras 16-40.

⁹²³ Para. 39.

such as potential recipients in the case of the victim donating blood, as well as health-care workers handling the blood.⁹²⁴

4.3.5.2. United States

As with the ADF, the US military is an extremely HIV/AIDS aware institution. Since 1987, it has been policy that applicants for the US military are screened before entering the service, and follow-up testing is conducted on a regular basis.⁹²⁵ Education about transmission of the virus as well as prevention is undertaken. It is now required that HIV positive military personnel are required to sign 'safe sex' orders. These orders require these personnel to inform sexual partners of their HIV status; to use protective measures during sexual relations; to inform medical (emergency or other) personnel of their HIV status in the event of medical care (emergency or other); and not to donate blood, sperm, tissues or other organs.⁹²⁶ As these orders are issued, under the authority of Article 90 of the UCMJ,⁹²⁷ violating these orders subjects the HIV positive member to the military criminal justice system.

It would be assertive and advantageous, and in accordance with the military's 'public duty' and 'military objective' to take this policy further, and to enact a provision specifically prohibiting sexual relations with the local population during a PSO, in particular prostitutes,⁹²⁸ for the reasons of preventing the spread of HIV/AIDS. This would be in keeping with the military's objective of

⁹²⁴ Paras 88-98.

⁹²⁵ Department of Defense Directive Number 6485.1, 19 March 1991 (incorporating Change 1, 10 August 1992), subject: Human Immunodeficiency Virus-1 (HIV-1).

⁹²⁶ Regulation of sexual conduct of HIV infected military personnel has been deemed constitutional as the military has a compelling justification of preventing the spread of the virus; *United States v Dumford*, 30 M.J. 137 (CMA 1990); *United States v Negron*, 28 M.J. 775 (ACMR), *aff'd*, 29 M.J. 324 (CMA 1989); *United States v Sargeant*, 29 M.J. 812 (ACMR 1989).

⁹²⁷ 10 U.S.C. § 890. Art. 90. Assaulting or willfully disobeying superior commissioned officer

Any person subject to this chapter who—

(1) strikes his superior commissioned officer or draws or lifts up any weapon or offers any violence against him while he is in the execution of his office; or

(2) willfully disobeys a lawful command of his superior commissioned officer;

shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.

⁹²⁸ In developing countries, women and girls often engage in unprotected sexual intercourse due to lack of access to condoms or a desire to earn more money from clients willing to pay more for sex without a condom; *see supra* discussion in Chapter 1.

preventing its members from spreading the HIV antibody. In fact, the military sees it as a positive duty to prevent the spread of HIV/AIDS, which stems from a history of prevention of STIs in general.⁹²⁹ This is part of a broader protection of public health in both the military and the non-military community. It is seen as a legitimate power of the criminal law (as represented by bodies such as the police) to take action in the prevention of the spread of communicable disease.⁹³⁰

In the case of *United States v Dumford*, which dealt with a service member who had engaged in unprotected sexual intercourse with a civilian, the Court of Military Appeals held:

“Appellant’s argument that the order lacks any valid military purpose is without merit. In *United States v Stewart*, 29 M.J. 92 (CMA 1989), we took note of the dangers of unprotected sexual intercourse by those infected with HIV. Consequently, we are certain that, when a servicemember is capable of exposing another person to an infectious disease, the military has a legitimate interest in limiting his contact with others, including civilians, and other preventing the spread of that condition. See *United States v Johnson*, 30 M.J. 53 (CMA 1990). Fn 2: We have absolutely no doubt that preventing a servicemember who has HIV from spreading it to the civilian population is a public duty of the highest order and, thus, is a valid military objective.”⁹³¹

The appellant had been charged with “willfully disobeying the command of a commissioned officer not to engage in sexual activity without informing his partner that he was infected with the Human Immunodeficiency Virus (HIV) and taking precautions against spreading the virus; and assault with a means likely to produce death or grievous bodily harm, in violation of Articles 90 and 128, Uniform Code of Military Justice”.⁹³² Crimes such as attempted murder, attempted manslaughter, and aggravated assault are all possible charges for a service member who is HIV positive and who engages in unprotected sexual relations.⁹³³

⁹²⁹ STIs, or as they used to be referred to, venereal diseases, have always been a major concern for the military, especially in armed conflict situations, when personnel frequent prostitutes. S. Sun, 'Where the Girls Are: The Management of Venereal Disease by United States Military Forces in Vietnam' (2004) 23 (1) *Literature and Medicine* 66-87; L.C.T.B. Turner, 'The Suppression of Prostitution in Relation to Venereal Disease Control in the Army' (1943) 7 *Federal Probation* 8-11.

⁹³⁰ *Love v Superior Court*, 276 Cal. Rptr. 660 (Ct. App. 1990), at 662.

⁹³¹ *United States v Dumford*, 30 M.J. 137 (CMA 1990), at 138, incl. fn. 2.

⁹³² *Ibid.*, at 137.

⁹³³ See *United States v Schofield*, 40 M.J. 132 (CMA 1994); *United States v Johnson*, 30 M.J. 53 (CMA 1990); *United States v Stewart*, 29 M.J. 92 (CMA 1989); *United States v Reister*, 40 M.J. 666 (NMCMA 1994); *United States v Joseph*, 37 M.J. 392 (CMA 1993) (interestingly, in this case Joseph was found guilty of aggravated

Evidently, these are crimes that can only be applied to personnel who are already infected with HIV. However, if direct, written orders requiring a signature are issued to personnel to not engage in sexual relations with any members of the local population during a PSO, as well as a specific order disallowing engaging the services of a prostitute, violation of such an order could be prosecuted under Article 90.⁹³⁴

The General Article can also be used to prosecute these acts of sexual relations, as confirmed in *Dumford*: “It is clear to us that such conduct [a servicemember exposing another person to an infectious disease] could be found to be service-discrediting [under] Art. 134, Uniform Code of Military Justice...”⁹³⁵

While both Australian and US offences discussed in this section do not strike at the heart of the issue of prostitution and trafficking, some are important step towards reducing the spread of HIV/AIDS, and may assist in adding another deterrent to engaging in inappropriate sexual relations whilst involved in a PSO. It is clear that the military in both states takes the issue of stopping the spread of HIV/AIDS very seriously, from the policies enacted and the adoption of the frame of reference that avoiding the spread of the virus is a military objective. However, due to neither country having broad express provisions criminalising the transmission of HIV/AIDS, there is a reliance on crimes such as violation of orders or assault. Where there are express transmission-related offences they are restricted to situations involving prostitution only, through the ACT *Prostitution Act*, which circumscribes the scope of application of the crime.

Both states should enact a specific provision that deals directly with HIV/AIDS-related offences. The offence could be ‘exposing another person to an infectious disease’. The definition could include not only engaging in unsafe intercourse when already infected, but also engaging in indiscriminate

assault even though he had used a condom in the sexual relations, because he had not informed the woman of his HIV status); and *United States v Bygrave*, 40 M.J. 839 (NMCMR 1994).

⁹³⁴ *Supra* note 927.

⁹³⁵ *Dumford*, *supra* note 931, at 138, fn. 2; the court also referenced *United States v Woods*, 28 M.J. 318-19 (CMA 1989).

unsafe sexual activities, an action which highly increases the risk of HIV/AIDS transmission.⁹³⁶ Unsafe sexual activities would include sexual activities with a prostitute and sexual intercourse without the use of prophylaxis under certain circumstances. The latter element would have to contain limitations, as it would be unreasonable to demand all personnel use prophylaxis in all sexual situations, such as between married couples. For example, engaging in sexual activity with a prostitute without use of prophylaxis could be an aggravating factor in the crime, resulting in a higher penalty. Each situation could be assessed on a case-by-case basis in order to determine whether or not the use of prophylaxis should have been warranted.

Enacting such a provision would draw attention to the seriousness of the issue, bringing more awareness to the fact that these are criminal offences. An express provision in the DFDA and the UCMJ would ensure that there is no possibility of challenging a charge on the basis of vagueness or lack of knowledge of the type of behaviour that is prohibited. This would ideally be accompanied by increased interaction with organisations or agencies such as UNAIDS or AIDS awareness NGOs, and special training for PSO personnel on HIV/AIDS in addition to the regular training provided.

4.3.6. Trafficking and Sexual Slavery

Both Australian and US law suffer from significant flaws in legislative provisions dealing with trafficking and sexual slavery. These shortcomings stem from problems with extraterritorial jurisdiction and from offence definitions, which will result in an inability to prosecute Australian personnel for trafficking and US personnel for sexual slavery.

The Commonwealth *Criminal Code Act* contains two divisions of provisions prohibiting slavery, sexual servitude and deceptive recruiting,⁹³⁷ and trafficking in persons and debt bondage.⁹³⁸ There is no issue with extraterritorial jurisdiction, as extended geographical jurisdiction category B applies to

⁹³⁶ The offence could also include activities related to sharing needles.

⁹³⁷ *Criminal Code Act*, Division 270.

⁹³⁸ *Criminal Code Act*, Division 271.

both sections, which means that the offences apply to conduct engaged in partly or wholly outside Australia by an Australian citizen or resident.⁹³⁹

However, trafficking offences under the *Criminal Code Act* are limited in application, in that the offence must involve entry or proposed entry into, or exit or proposed exit from Australia.⁹⁴⁰ This leaves a lacuna in the legislation, meaning that, even though the extraterritorial jurisdiction exists, Australian peacekeeping personnel cannot be prosecuted for trafficking committed without entry or proposed entry into, or exit or proposed exit from Australia, due to the limited structure of the substantive criminal law for this offence.

Such a definitional problem is not found for the crime of sexual servitude, which is a comprehensive provision. Sexual servitude is defined as “the condition of a person who provides sexual services and who, because of the use of force or threats: (a) is not free to cease providing sexual services; or (b) is not free to leave the place or area where the person provides sexual services.”⁹⁴¹ A person is guilty of an offence when engaging in conduct that “causes another person to enter into or remain in sexual servitude” and “who intends to cause, or is reckless as to causing, that sexual servitude”.⁹⁴²

The ACT *Crimes Act* includes the crime of forcible confinement, prohibiting the unlawful confinement or imprisonment of another person.⁹⁴³ The *Crimes Act* also contains provisions expressly outlawing sexual servitude and deceptive recruiting for sexual services. The definition and the offence of sexual servitude are the same as the *Criminal Code Act* definition and offence provided above.⁹⁴⁴ However, the *Crimes Act* goes one step further and determines it to be an offence to conduct a business that involves the sexual servitude of others, with the knowledge that or recklessness about whether the business involves the sexual servitude of others.⁹⁴⁵ Conducting a business is taken to include, but not

⁹³⁹ See Appendix 3 for full text of category B jurisdiction. Except the crimes of domestic trafficking, which are not relevant to the context of this thesis. Category B jurisdiction applies to ss. 270.6, 270.7, 270.1.2, 271.3, 271.4, 271.8, and 271.9.

⁹⁴⁰ Ss. 271.2, 271.3, and 271.4.

⁹⁴¹ S. 270.4.

⁹⁴² S. 270.6.

⁹⁴³ *Crimes Act* (ACT), s. 34.

⁹⁴⁴ *Supra* text at notes 941 and 942. *Crimes Act* (ACT), s. 79(1).

⁹⁴⁵ *Crimes Act*, s. 79(2).

be restricted to, taking part in the management of the business; or exercising control or direction over the business; or providing finance for the business.⁹⁴⁶ This provision could be used to prosecute clients of such a business, as such a business only exists due to the demand from clientele. It is the money from the clientele that enables the business to subsist.⁹⁴⁷ Personnel who engage in behaviour that assists the business or facilitates its continued existence could also be prosecuted. Such behaviour may include warning brothel owners of impending raids or providing transport of trafficked women in exchange for free sexual services.⁹⁴⁸

It is also an offence to, with the intention of inducing someone else to enter into an engagement to provide sexual services, deceive the other person about the fact that the engagement will involve the provision of sexual services.⁹⁴⁹ This would be a very useful provision for the prosecution of behaviour relating to trafficking, as many women are trafficked after being promised lawful jobs in other, more prosperous, countries.⁹⁵⁰

In contrast, US military law is significantly lacking in any provisions proscribing trafficking and sexual slavery. The only provision that could be applied to situations of trafficking and sexual slavery is Article 134 of the UCMJ, which covers the crime of kidnapping. Under the definition, there is no requirement for any kind of request for ransom or other such 'bargaining'.⁹⁵¹ The elements are simply that:

- (1) That the accused seized, confined, inveigled, decoyed, or carried away a certain person;
- (2) That the accused then held such person against that person's will;
- (3) That the accused did so willfully and wrongfully; and

⁹⁴⁶ S. 79(3).

⁹⁴⁷ For example, it was estimated in 2002 that in Bosnia and Herzegovina, 30% of brothel clientele were PSO personnel, but that such personnel were the source of 70% of the money earned by the brothels in a year. 'Trafficking, Slavery and Peacekeeping: The Need for a Comprehensive Training Program. A Conference Report.' (Transnational Crime and Corruption Centre & UN Interregional Crime and Justice Research Institute, Turin, 9-10 May 2002) , p. 14.

⁹⁴⁸ Subcommittee on International Operations and Human Rights of the Committee on International Relations, Second Session, 'The U.N. and the Sex Slave Trade in Bosnia: Isolated Case or Larger Problem in the U.N. System?' (U.S. Government Printing Office, Washington D.C., 24 April 2002) Document No. 107-85, p. 53.

⁹⁴⁹ S. 80,

⁹⁵⁰ See discussion *supra* Chapter 2.

⁹⁵¹ This is in contrast to the crime of kidnapping under the US Code, which requires that the person be held for ransom or reward or otherwise. 18 U.S.C. § 1201.

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.⁹⁵²

Any involvement in trafficking or sexual slavery would fall into this definition, as it includes “lur[ing], lead[ing] astray, or entic[ing] by false representations or other deceitful means”.⁹⁵³ However, this does not recognise the fact that the abduction took place for the purposes of forcing the person into sexual slavery. It may be considered as an aggravating factor in sentencing, but it would be more appropriate to have an express provision dealing with the crimes of sexual slavery and trafficking.

Some crimes relating to trafficking and slavery not found in the UCMJ are to be found in the civilian criminal code. These are peonage, forced labour, slavery and trafficking in persons (including children);⁹⁵⁴ sexual exploitation and other abuse of children;⁹⁵⁵ and transportation for illegal sexual activity and related crimes.⁹⁵⁶ However, extraterritorial jurisdiction does not apply to all these crimes. The US has extraterritorial jurisdiction over sexual exploitation and other abuse of children, sex trafficking of children, and transportation for illegal sexual activity and related crimes, as both include jurisdiction involving foreign commerce.⁹⁵⁷

In relation to trafficking, forced labour, peonage and slavery, no reference is made to jurisdiction in the respective provisions of the Code.⁹⁵⁸ Hence it is necessary to consult jurisprudence on jurisdiction. In the case of *United States v Corey*,⁹⁵⁹ the United States Court of Appeals, Ninth Circuit, upheld the principle that:

“Congress may enforce its laws beyond the territorial boundaries of the United States.

(“Generally there is no constitutional bar to the extraterritorial application of United States penal

⁹⁵² R.C.M. 92.b. *Elements*.

⁹⁵³ R.C.M. 92.c.(1).

⁹⁵⁴ Chapter 77 of Title 18, §§ 1581-1595.

⁹⁵⁵ Chapter 110 of Title 18, §§ 2251-2260.

⁹⁵⁶ Chapter 117 of Title 18, §§ 2421-2427.

⁹⁵⁷ See Chapter 1 of Title 18, § 10. “The term “foreign commerce”, as used in this title, includes commerce with a foreign country.”

⁹⁵⁸ There are crimes within these sections dealing with slave vessels, and some of these imply jurisdiction over the vessel at any place. § 1585 outlaws the seizure, detention, transportation or sale of slaves, and states: “Whoever, being a citizen or resident of the United States... on any foreign shore seizes any person with intent to make that person a slave... shall be fined... or imprisoned not more than seven years, or both.” The only condition is that the citizen or resident must be a member of a crew or ship’s company (either US or foreign). Thus the provision is not universally applicable.

⁹⁵⁹ *United States v Corey*, 232 F.3d 1166.

laws.”). Whether Congress has in fact exercised such power is a question of statutory construction, normally subject to the rule “that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”... The territorial presumption is thus based on the common-sense inference that, where Congress does not indicate otherwise, legislation dealing with domestic matters is not meant to extend beyond the nation's borders.”⁹⁶⁰

However, the Court also held that

“the presumption does not apply where the legislation implicates concerns that are not inherently domestic. For instance, in *United States v. Bowman*,⁹⁶¹ the Supreme Court held that the territorial presumption does not govern the interpretation of criminal statutes that, by their nature, implicate the legitimate interests of the United States abroad... Although the statute there did not contain an extraterritoriality provision, the Court concluded that it covered the conduct in question... Thus, courts do not apply the territorial presumption where it is not a reliable guide to congressional intent.”

Corey in fact concerned crimes of aggravated sexual abuse and sexual abuse committed by a U.S. citizen working as a civilian employee at the U.S. Air Force Base at Yokota, Japan. The Court of Appeals determined that with the other nation’s consent, legislative jurisdiction over the territory of a foreign state could be acquired. It found that the legislative provision in question could apply “where the foreign sovereign does not or cannot object to the exercise of such jurisdiction” .⁹⁶²

The Court actually rejected *Gatlin*,⁹⁶³ and examined the relevant statute as a whole, including an assessment of the history of the statute. Based on this broad outlook, the Court found:

“Taken as a whole, 18 U.S.C. § 7 extends the jurisdiction of the federal criminal laws to areas where American citizens and property need protection, yet no other government effectively safeguards those interests. Congress unmistakably had foreign locales in mind when it set about defining that jurisdiction.”⁹⁶⁴

The reasoning of the Court of Appeals is inherently logical, and would be well applied to the crimes of trafficking, forced labour, peonage and slavery, where jurisdiction is not mentioned. This is particularly the case given that during PSOs, the host state generally has a fractured or non-existent

⁹⁶⁰ *Ibid.*, at 1170, citations omitted.

⁹⁶¹ 260 U.S. 94, 98, 43 S.Ct. 39, 67 L.Ed. 149 (1922).

⁹⁶² *Corey*, at 1171.

⁹⁶³ *See supra*, note 756.

⁹⁶⁴ *Corey*, at 1172.

legal infrastructure, and the US will have agreements with the host state for the US to have primary jurisdiction, as well as the fact that these are generally crimes that can involve a transnational element. Even if extraterritorial jurisdiction were found not to apply to the crime of trafficking, the crime of transportation for illegal sexual activity and related crimes would still be available to be used.

Unlike the Australian legislation, there is no provision outlawing sexual slavery under US law. The crime of sale into involuntary servitude is the closest offence, which forbids knowingly and willfully holding or selling another person to involuntary servitude.⁹⁶⁵ However, as with the offence of kidnapping, this clearly avoids the essential element of sexual slavery being for the specific purposes of providing sexual services.

There are clearly problems with regards to provisions dealing with trafficking and sexual slavery in both states, which need to be solved through amendments and enactment of new provisions. While Australia has an effective and applicable provision on sexual slavery, the provision on trafficking is limited by its definition and would not apply to trafficking engaged in wholly outside the territory of Australia. It thus requires amendment to remove the limitation that the crime must involve entry or proposed entry into, or exit or proposed exit from Australia. The US has no provision enjoining sexual slavery, and while it does have a provision prohibiting trafficking, the extraterritorial application of the provision is not straight-forward and would have to be decided by a federal court.

4.3.7. War Crimes and Crimes Against Humanity

There is a stark contrast between the laws in Australia and the United States that proscribe war crimes and crimes against humanity. An examination of each provides an example of how these crimes can be dealt with comprehensively by some states, and quite poorly by other states.

⁹⁶⁵ Chapter 77 of Title 18, § 1584.

The Australian federal *Criminal Code Act* was amended by the *International Criminal Court (Consequential Amendments) Act* in 2002.⁹⁶⁶ This resulted in comprehensive provisions covering war crimes, crimes against humanity and genocide.⁹⁶⁷ All three categories of offences are an all-inclusive implementation of the crimes as set out under the Rome Statute.⁹⁶⁸ War crimes provisions in fact cover more offences than found in the Rome Statute, with an additional subdivision encompassing ‘War crimes that are grave breaches of Protocol I to the Geneva Conventions’.⁹⁶⁹ Extended geographical jurisdiction over war crimes, crimes against humanity and genocide falls under Category D jurisdiction. Hence, extraterritorial jurisdiction exists and is not restricted to only Australian citizens or residents.⁹⁷⁰ As the potentially applicable crimes are identical to those found in the Rome Statute, the analysis of the prospective applicability of these offences will be undertaken in Chapter 5, which considers the potential jurisdiction of the ICC. These crimes are inhumane treatment,⁹⁷¹ wilfully causing great suffering,⁹⁷² cruel treatment,⁹⁷³ outrages upon personal dignity,⁹⁷⁴ rape,⁹⁷⁵ sexual slavery,⁹⁷⁶ enforced prostitution,⁹⁷⁷ and sexual violence.⁹⁷⁸

It is clear that there is again no provision expressly outlawing sexual exploitation. However, this could be prosecuted under outrages upon personal dignity (in which the perpetrator “humiliates, degrades or otherwise violates the dignity” of the victim)⁹⁷⁹, and/or sexual violence. The latter would emphasise the sexual element of the crime. The crime of sexual violence is an act of a sexual nature that occurs without consent, and a person is deemed not to have consented in a situation of abuse of

⁹⁶⁶ *Criminal Code Act* (Cth) 1995; *International Criminal Court (Consequential Amendments) Act* (Cth) 2002, Schedule 1—Amendment of the *Criminal Code Act* 1995. In addition to these amendments, the *War Crimes Act* (Cth) 1945 covers war crimes committed by Australian citizens or residents during World War II.

⁹⁶⁷ *Criminal Code Act* (Cth), Chapter 8 Offences against humanity and related offences. The chapter also includes crimes against the administration of the justice of the International Criminal Court.

⁹⁶⁸ Any wording changes are very slight.

⁹⁶⁹ Subdivision H, ss. 268.95- 268.101.

⁹⁷⁰ *Supra* note 734.

⁹⁷¹ S. 268.26.

⁹⁷² S. 268.28.

⁹⁷³ S. 268.72.

⁹⁷⁴ Ss. 268.58; 268.74.

⁹⁷⁵ Ss. 268.59; 268.82.

⁹⁷⁶ Ss. 268.60; 268.83.

⁹⁷⁷ Ss. 268.61; 268.84.

⁹⁷⁸ Ss. 268.64; 268.87.

⁹⁷⁹ Ss. 268.58(1)(a); 268.74(1)(a).

power or “because of the perpetrator taking advantage of a coercive environment”,⁹⁸⁰ which would adequately encompass the abuse of power aspect of sexual exploitation.

One principal difference that is found in the Australian war crimes legislation is the mental element of recklessness. The Rome Statute does not contain recklessness as a mode of criminal *mens rea*, but it is commonly used in Australian law,⁹⁸¹ including war crimes. For example, rape and enforced prostitution can be committed with recklessness as to whether there was a lack of consent; and sexual slavery can be committed with recklessness as to causing the sexual slavery.⁹⁸² Within the chapeau elements, a perpetrator may also be reckless as to the status of a person as a protected person or as a civilian not taking part in hostilities.⁹⁸³ Thus there is a slightly broader aspect to the *mens rea* required to commit these crimes under Australian law than is found in the Rome Statute.

It is, however, unlikely that an Australian peacekeeper would be charged with a war crime or a crime against humanity for the crimes relevant to this thesis. This is not based on the fact that the Australian authorities would be unwilling to prosecute their own nationals for war crimes or crimes against humanity. The reasoning for this will also be discussed in Chapter 5, but may be briefly mentioned here as the difficulty of applying the chapeau elements of the crimes. That is, there is a required nexus to armed conflict for war crimes, and for crimes against humanity, the crime must be committed as part of a large scale or systematic attack on the civilian population.⁹⁸⁴

⁹⁸⁰ Ss. 268.64(3); 268.87(3).

⁹⁸¹ See e.g. *Vallance v. The Queen* [1961] HCA 42; (1961) 108 CLR 56; *R v Crabbe* [1985] HCA 22; (1985) 156 CLR 464. Recklessness is categorised as a fault element of the crimes within s. 5.4 of the *Criminal Code Act* (Cth):

(1) A person is reckless with respect to a circumstance if:

- (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
- (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(2) A person is reckless with respect to a result if:

- (a) he or she is aware of a substantial risk that the result will occur; and
- (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(3) The question whether taking a risk is unjustifiable is one of fact.

(4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

⁹⁸² Ss. 268.59(b); 268.82(b); 268.60(b); 268.83(b); 268.61(a); 268.84(a); 268.64(a)(ii); 268.87(a)(ii).

⁹⁸³ Ss. 268.26(c); 268.28(c); 268.72(c); 268.74(c).

⁹⁸⁴ See discussion *infra* Chapter 5; Rome Statute of the International Criminal Court, Articles 7 and 8.

The United States law relating to war crimes is far from comprehensive. Title 18 of the United States Code, the War Crimes Act of 1996, defines war crimes under United States jurisdiction. The relevant section states that:

“(c) Definition.— As used in this section the term “war crime” means any conduct—

(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;

(3) which constitutes a grave breach of common Article 3 (as defined in subsection (d)) when committed in the context of and in association with an armed conflict not of an international character...”⁹⁸⁵

Both Additional Protocols specifically prohibit “rape, forced prostitution and other indecent assault” of women and children.⁹⁸⁶ However, as the United States is not a party to either of the Additional Protocols, only the relevant provisions in the four Geneva Conventions are applicable as war crimes under United States jurisdiction.⁹⁸⁷ The only pertinent crimes under the grave breaches are inhuman treatment, and wilfully causing great suffering or serious injury to body or health.⁹⁸⁸

Crimes such as rape, sexual exploitation, sexual slavery, enforced prostitution, or any other form of sexual violence could be categorised under any of the grave breaches listed above. These gender-based crimes are inhuman treatment, and cause great suffering and serious injury to body or health.⁹⁸⁹ However it would be far more all-encompassing, and thus avoid any issues over definition, to expand the legislation to expressly proscribe these crimes.⁹⁹⁰ Including these crimes would also be a clear recognition by the United States government of these crimes and demonstrate that the government advocates the prevention of impunity for perpetrators of gender-based crimes.

Given the fact that that the War Crimes Act was only enacted in 1996 and has been amended since, the statutes of the ICTY and the ICTR were already in existence as references for a somewhat more

⁹⁸⁵ 18 U.S.C. § 2441(c). Omitted subsections (2) and (4) in the definition have no relevance to this paper.

⁹⁸⁶ API Art. 76; APII Art. 4(2)(e).

⁹⁸⁷ ICRC IHL database of the States party to the main treaties, as of 4 February 2010, at [http://www.icrc.org/IHL.nsf/\(SPF\)/party_main_treaties/\\$File/IHL_and_other_related_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf).

⁹⁸⁸ GCI art. 50; GCII art. 51; GCIII art. 130; GCIV art. 147.

⁹⁸⁹ See *supra* Chapter 2.

⁹⁹⁰ There are many other crimes that should be added to make the legislation comprehensive, but that is outside the scope of this thesis.

comprehensive coverage of war crimes. Since then the ICC Rome Statute has developed what is the most wide-ranging codification of war crimes to date. Given the US' distinct lack of willingness to become a party to the Rome Statute, it could at the very least prove its lack of need for the ICC by demonstrating that its own law is all-inclusive, using the Rome Statute as a guideline for amendments to the War Crimes Act of 1996. As noted above, the War Crimes Act also includes crimes committed during non-international armed conflict, as grave breaches of Common Article 3. This section of the War Crimes Act was amended in 2006 to expand the definition of what constitutes Common Article 3 violations. Such violations now include cruel or inhuman treatment, rape, and sexual assault or abuse.⁹⁹¹ Such provisions would not apply to war crimes committed by a US peacekeeper, serving in an international context. However the fact that the amendments were made is interesting as it is surprising the amendments were not more comprehensive. It would have been beneficial for the US, already spending resources and time on expanding the range of war crimes covered in non-international armed conflict, to also consider the need for more comprehensive provisions dealing with war crimes committed during international armed conflict, and include amendments to the definition of such war crimes.

As with Australian law, the applicability of the war crimes provisions to American personnel is highly improbable. However, rather than being due to definitional concerns, this is based on US policy that is found in the Rules for Courts-Martial in the Manual for Courts-Martial, and the Department of the Army Field Manual on the Law of Land Warfare.⁹⁹² The MCM expressly states that "ordinarily persons subject to the code [of military justice] should be charged with a specific violation of the code rather than a violation of the law of war".⁹⁹³ The Army Field Manual on the Law of Land Warfare asserts:

⁹⁹¹ 18 U.S.C. § 2441(d).

⁹⁹² This policy is also supported by military lawyers, *see e.g.* M.M.N. White, 'Charging War Crimes: A Primer for the Practitioner' (2006) *The Army Lawyer* 1-11, where the author, a US Army Judge Advocate, concludes "The decision to charge a servicemember with violations of the law of war... is rife with political repercussions... the enumerated offenses under the UCMJ should be the primary tool for prosecuting servicemembers suspected of violating the laws of war." *Ibid.*, at pp. 10-11.

⁹⁹³ R.C.M. 307(c)(2)(D).

“The United States normally punishes war crimes as such only if they are committed by enemy nationals or by persons serving the interests of the enemy State. Violations of the law of war committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice and, if so, will be prosecuted under that Code.”⁹⁹⁴

This policy is confirmed by US practice. After the massacre of several hundred unarmed civilians at My Lai in Vietnam during the Vietnam War, Lieutenant William Calley was charged with multiple specifications of premeditated murder under Article 118 of the UCMJ, but not with any war crimes.⁹⁹⁵ In 2003, US Staff Sergeant Frank Ronghi pled guilty to and was found guilty of premeditated murder, indecent acts with a child under 16 years of age, and forcible sodomy of a child less than 16 years of age, in violation of Articles 118, 134, and 125 of the UCMJ.⁹⁹⁶ These acts were committed when he was engaged as part of the American peacekeeping contingent in Kosovo in 2000.⁹⁹⁷ Cases against US military personnel involving crimes committed in Iraq have also been brought under the UCMJ. This includes the trials against two marines for indiscriminate killings in Fallujah charged with murder and dereliction of duty,⁹⁹⁸ and cases against personnel involved in torture and abuse at Abu Ghraib prison, who were charged with maltreatment of detainees.⁹⁹⁹ In contrast, the US has charged non-nationals with war crimes, such as the case of *Ex parte Quirin*.¹⁰⁰⁰ The US Supreme Court determined that jurisdiction existed over German nationals charged with violations of the law of war.¹⁰⁰¹

⁹⁹⁴ The Department of the Army Field Manual 27-10, *The Law of Land Warfare* (July 1956), para. 507(b).

⁹⁹⁵ Charges available at http://www.law.umkc.edu/faculty/projects/ftrials/mylai/MYL_ctchar.htm. *United States v Calley*, 46 CMR 1131 (1971); aff'd, 22 U.S.C.M.A 534, 48 CMR 19 (1973).

⁹⁹⁶ *United States v Ronghi*, No. ARMY 20000635, (A. Ct. Crim. App. May 27, 2003).

United States v Ronghi, 60 M.J. 83, 86 (C.A.A.F. 2004).

⁹⁹⁷ As part of the NATO Kosovo Force, KFOR.

⁹⁹⁸ J. Shaulis, 'US civilian jury acquits ex-Marine of Fallujah killings', *Jurist*, (29 August 2008), <http://jurist.law.pitt.edu/paperchase/2008/08/us-civilian-jury-acquits-ex-marine-of.php>; J. Belczyk, 'Military jury acquits Marine of all charges in Fallujah detainee killing', *Jurist*, (9 April 2009), <http://jurist.law.pitt.edu/paperchase/2009/04/military-jury-acquits-marine-of-all.php>.

⁹⁹⁹ List of cases <http://www.globalsecurity.org/intell/world/iraq/abu-ghurayb-chronology.htm>.

¹⁰⁰⁰ *Ex parte Quirin*, 317 U.S. 1 (1942).

¹⁰⁰¹ The petitioners were arguing against the jurisdiction of military commissions appointed by the President. The Military Commissions Act of 2006 actually grants jurisdiction over more war crimes than are listed in the War Crimes Act; see 10 U.S.C. § 950v, Crimes triable by military commissions. Persons triable by military commissions under the Military Commissions Act are alien unlawful enemy combatants, so only non-US nationals can be tried in the commissions; 10 U.S.C. § 948c.

This policy and practice is contradictory to the jurisdiction of the War Crimes Act, which applies only when the “person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States”.¹⁰⁰² Despite the fact that there is specific jurisdiction granted for war crimes when committed by a member of the USAF or a US national, the US policy is not to charge military personnel or nationals with war crimes. Legislation and policy should be in sync to ensure an effective legal system.

In addition to the limited range of war crimes, the US currently lacks any legislation covering crimes against humanity, in its criminal legislation, either military or civil.¹⁰⁰³ There has recently been a bill proposed for the Crimes Against Humanity Act 2009.¹⁰⁰⁴ The legislation would make it a crime under federal law to commit a number of crimes as part of a widespread and systematic attack against a civilian population. The listed crimes are murder, peonage, kidnapping, slavery, sale into involuntary servitude, forced labour, trafficking, and hostage taking, if committed within the United States. Crimes included when committed within the special maritime and territorial jurisdiction of the United States also cover sex trafficking of children, sexual abuse, aggravated sexual abuse and kidnapping. Finally, several crimes are included under the provision without territorial limitation, namely torture; extermination; national, ethnic, racial, or religious cleansing; arbitrary detention; and imposed measures intended to prevent births. This is an intriguing blend of conduct covered by the

¹⁰⁰² 18 U.S.C. § 2441(b).

¹⁰⁰³ The US does have provisions covering genocide, which were enacted in 1988, and are quite similar to the definitions found in the ICTY, ICTR and ICC statutes; 18 U.S.C. §§ 1091-1093. The legislation has also been heavily criticised. See L.J. Le Blanc, *The United States and the Genocide Convention*, (Duke University Press, Durham 1991); J.J. Paust, 'Congress and Genocide: They're Not Going To Get Away With It' (1989) 11 *Michigan Journal of International Law* 90-104; J.D. Van der Vyer, 'Prosecution and Punishment of the Crime of Genocide' (1999) 23 *Fordham International Law Journal* 286-356; L.A. Steven, 'Note: Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of its International Obligations' (1999) 39 *Virginia Journal of International Law* 425-466; S. Power, 'The United States and Genocide Law: A History of Ambivalence', in Sewell and Kaysen (eds.), *The United States and the International Criminal Court*, (Rowman & Littlefield Publishers, New York 2000), p. 165.

The legislation was amended in 2007 by the Genocide Accountability Act of 2007, which allows for prosecution if the offender is a US national or the offence was committed in whole or in part in the US, or if an offender is brought into or found in the US regardless of where the offence was committed; 18 U.S.C. §§ 1091(d).

¹⁰⁰⁴ Crimes Against Humanity Act of 2009 (Introduced in Senate, 111th Congress) S. 1346 IS, 24 June 2009. To be inserted as Chapter 25A of Part 1 of Title 18 of the US Code. See also 'Durbin, Leahy and Feingold Introduce Legislation Making Crimes Against Humanity a Violation of US Law', Press Release Senator Dick Durbin, 24 June 2009 <http://durbin.senate.gov/showRelease.cfm?releaseId=315009>; Human Rights Watch, 'US: Support Law on Crimes Against Humanity', New York, 24 June 2009 <http://www.hrw.org/en/news/2009/06/24/us-support-law-crimes-against-humanity>. The Bill has been referred to the Committee on the Judiciary.

bill, as it does not necessarily include all categories of crimes against humanity to be found in the Rome Statute, such as deportation or forcible transfer of population.¹⁰⁰⁵ However, included are categories of crimes that fall under genocide under the Rome Statute (and indeed, in Australian legislation), such as measures intended to prevent births.¹⁰⁰⁶ In fact, the concept of 'national, ethnic, racial or religious cleansing' is a term that tends to be used to refer to genocide itself, the goal of which is to destroy in whole or in part a particular group.¹⁰⁰⁷ This is perhaps following the ideology of some American scholars and experts, who are avoiding separate terminology for international crimes and referring to them under the umbrella of 'genocide'¹⁰⁰⁸ or 'atrocity crimes'.¹⁰⁰⁹ The inclusion of such a crime may be a positive step, as it will broaden the potential of the US to prosecute for crimes that have targeted a group but fall short of the evidentiary requirements of genocide of the *dolus specialis* of the intent to destroy that group in whole or in part.¹⁰¹⁰ However, 'national, ethnic, racial or religious cleansing' is not defined in the Crimes Against Humanity Act. This would leave the term open to much debate in judicial forums as to a legal definition to enable accurate application.

Unfortunately the bill defines crimes against humanity as crimes committed as part of a widespread *and* systematic attack against a civilian population rather than the disjunctive widespread *or* systematic. This conjunctive requirement deviates from the international definition of crimes against humanity, which presents widespread and systematic as disjunctive.¹⁰¹¹ Requiring the attack to be

¹⁰⁰⁵ Article 7(1)(d) of the Rome Statute.

¹⁰⁰⁶ Article 6(d) Rome Statute.

¹⁰⁰⁷ 'Ethnic cleansing' is not a legal term, and such behaviour is referred to as genocide in case law of the ICTR and ICTY; see e.g. *Prosecutor v Kayishema and Ruzidana*, Judgement and Sentence, ICTR-95-1-T (21 May 1999) paras. 98-99; *Prosecutor v Jelacic*, Trial Judgement, IT-95-10-T (14 December 1999) paras. 67-72.

¹⁰⁰⁸ M.K. Albright and W.S. Cohen, 'Preventing Genocide: A Blueprint for U.S. Policymakers' (United States Holocaust Memorial Museum, The American Academy of Diplomacy, and the Endowment of the United States Institute of Peace Washington, DC, 2008) , p. xxii.

¹⁰⁰⁹ D. Scheffer, 'Genocide and Atrocity Crimes' (2006) 1 (3) *Genocide Studies and Prevention* 229-250, pp. 229-250.

¹⁰¹⁰ U.S.C. 18 § 1091(a). See also Article 6 of the Rome Statute.

¹⁰¹¹ A. Cassese, *International Criminal Law*, 2nd ed., (Oxford University Press, Oxford 2008), p. 99; R. Dixon and C.K. Hall, 'Crimes against humanity- chapeau', in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., (C.H. Beck, Hart, Nomos, Muenchen, Oxford, Baden-Baden 2008), , pp. 176-178; H. von Hebel and D. Robinson, 'Crimes within the Jurisdiction of the Court', in Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, (Kluwer Law International, The Hague 1999), 79-126, pp. 94-95; D. Robinson, 'The Context of Crimes Against Humanity', in Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, (Transnational Publishers, Inc., Ardsley, NY 2001), 61-79, p. 63; T. Meron, 'Crimes Under the Jurisdiction of the International Criminal Court',

both widespread and systematic renders the provision far more limited in application, necessitating proof of both a large number of victims and the organised nature of the attack.¹⁰¹²

The bill as currently drafted applies to such crimes committed anywhere in the world by a US citizen or any person present in the United States regardless of nationality, or if the crime has been committed in whole or in part within the United States.

The US is clearly aware of the gaps in its legislation. This is evidenced by such statements as quoted below, the 2006 amendments to the Common Article 3 definition in the War Crimes Act and the proposal for the Crimes Against Humanity Act. It is also demonstrated, rather surreptitiously, through the rejection of the jurisdictional reach of the ICC. In initial negotiations over the Rome Statute, the US wanted the Security Council (and thus the US) to have the power to veto ICC jurisdiction.¹⁰¹³ However, this was only in relation to war crimes and crimes against humanity- not genocide. It is not a far reach to realise that, while the US has legislation covering genocide,¹⁰¹⁴ its legislation covering war crimes and crimes against humanity is poor to non-existent- thus leaving a US national potentially open to ICC jurisdiction through the “unable to prosecute” category.

Enhancing current legislation on war crimes and enacting new legislation dealing with crimes against humanity¹⁰¹⁵ would be in line with the US belief that

in Von Hebel, et al. (eds.), *Reflections on the International Criminal Court*, (TMC Asser Press, The Hague 1999), 47-55, p. 50; A. Cassese, 'Crimes against Humanity', in Cassese, et al. (eds.), *The Rome Statute of the International Criminal Court*, Vol. I, (Oxford University Press, Oxford 2002), 353-378, p. 366; *Prosecutor v Sesay, Kallon and Gbao (RUF Case)*, Trial Judgement, SCSL-04-15-T (2 March 2009) para. 78.

¹⁰¹² *Prosecutor v Kordic*, Appeal Judgement, IT-95/14/2-A (17 December 2004), para. 94. *See also Prosecutor v Blaskic*, Appeal Judgement, IT-95-14-A (29 July 2004), para. 101; *Prosecutor v Kunarac et al. (Foca)*, Appeals Chamber Judgement, IT-96-23-A (12 June 2002), para. 94. The ICTR has used almost identical language: “the scale of the attacks and the multiplicity of the victims”; *Prosecutor v Muyunyi*, Trial Judgement, ICTR-00-55A-T (12 September 2006), para. 512; *Prosecutor v Muhimana*, Trial Judgement, ICTR-95-1B-T (28 April 2005), para. 527; *Prosecutor v Semanza*, Trial Judgement, ICTR-97-20-T (15 May 2003), para. 329; *Prosecutor v Musema*, ICTR-96-13-A (27 January 2000), paras. 203-4; *RUF Case*, paras. 78-79. *See also Prosecutor v Katanga and Ngudjolo Chui*, Decision on the confirmation of charges, ICC-01/04-01/07 (30 September 2008) paras. 394, 397.

¹⁰¹³ J.D. van der Vyver, 'American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness' (2001) 50 *Emory Law Journal* 775-832, pp.797-8.

¹⁰¹⁴ *See supra* note 1003.

¹⁰¹⁵ *See* W.J. Aceves and P.L. Hoffman, 'Pursuing Crimes Against Humanity in the United States: The Need for a Comprehensive Liability Regime', in Lattimer and Sands (eds.), *Justice for Crimes Against Humanity*, (Hart Publishing, Oxford and Portland, Oregon 2003), 239-269.

“states, not international institutions are primarily responsible for ensuring justice in the international system.”¹⁰¹⁶ We believe the best way to combat these serious offenses is to build domestic judicial systems, strengthen political will and promote human freedom... The existence of credible domestic systems is vital to ensuring conditions do not deteriorate to the point that the international community is required to intercede... The United States will... continue our longstanding role as an advocate for the principle that there must be accountability for war crimes and other serious violations of international humanitarian law... We will take steps to ensure that gaps in United States’ law do not allow persons wanted or indicted for genocide, war crimes, or crimes against humanity to seek safe haven on our soil in hopes of evading justice.”¹⁰¹⁷

It is indeed true that “[t]he existence of credible domestic systems is vital to ensuring conditions do not deteriorate to the point that the international community is required to intercede”.¹⁰¹⁸ While ‘deteriorated’ may be too strong a word, it is evident that the US war crimes legislation does need action from the international community. Despite its obligations under the Geneva Conventions, the US took 41 years to enact war crimes legislation, and when it did, it was far from adequate. Even consequent actions taken to amend the legislation have been insufficient to render the War Crimes Act a comprehensive piece of law. Yet, despite this general need for new law, in the specific case of US personnel and citizens, it may ultimately be irrelevant to have an all-encompassing War Crimes Act, as it has been shown that in praxis they are not likely to be charged with war crimes, but rather under the UCMJ.

The legislation discussed in this section from Australia and the US demonstrates where there are gaps in national legislation in relation to gender-based crimes that amount to war crimes. While the Australian legislation is expansive, and the US act is not, as with other laws of both states the crime of sexual exploitation is not expressly addressed by either country. Australian law covers enforced prostitution but not prostitution-related activities in general. The US simply does not have any express provisions outlawing gender-based crimes in armed conflict. Thus it is necessary for both states to enact further provisions, or amend current legislation, in order to assure that national

¹⁰¹⁶ Ironically, despite the US fears, this is also what the ICC promotes.

¹⁰¹⁷ M. Grossman, 'American Foreign Policy and the International Criminal Court ' (Centre for Strategic and International Studies, Washington, DC, 6 May 2002) .

¹⁰¹⁸ *Ibid.*

authorities have the available jurisdiction to prosecute peacekeeping personnel. While not specifically referring to crimes committed during armed conflict, the Draft Convention does not preclude application during armed conflict. Henceforth, should states ratify and enact in domestic law the Draft Convention should it be adopted, peacekeeping personnel could still be prosecuted for those crimes whether committed during armed conflict or not.

4.4. Conclusion

In order to determine which of national or international criminal jurisdiction is or should be more effective in preventing and prosecuting gender-based crimes, it has been necessary to examine examples of national jurisdictions. In using the two jurisdictions of Australia and the United States, countries that both have personnel involved in peace support operations, it has been possible to see how national jurisdiction can be very effective, but also where problems may lie. These two states both have legal systems born from the Anglo legal system, but they have adapted very differently. There are clearly two separate areas where it is necessary for states to have comprehensive laws-extraterritorial jurisdiction over all types of personnel, and substantive legislative provisions covering the relevant crimes.

While the applicable legislation to Australian military and defence civilian personnel is somewhat complicated, it nonetheless results in relatively comprehensive substantive provisions covering a wide variety of crimes, all of which are expressly applicable extraterritorially. The discussion in this chapter has shown that the following acts are criminal offences for peacekeeping personnel: soliciting, duress in the context of prostitution, rape, child sexual services, sexual offences against children overseas, sexual assault, sexual intercourse with a minor, indecency, provision or receipt of commercial sex when infected with an STI, commercial sex without a condom, slavery, sexual servitude, trafficking, debt bondage, forcible confinement, conducting business that involves sexual servitude of others (including providing finance), war crimes, and crimes against humanity.

However, as has been demonstrated, this does not mean that there are no gaps in the Australian law. Problems lie in the area of HIV/AIDS transmission offences- there are no express transmission offences. While a peacekeeper may be charged with other offences (manslaughter, assault, endangering life, endangering health) it has been discussed that HIV/AIDS transmission would be difficult to prove under the definitions of such offences. There is also a lacuna in trafficking legislation, which must involve entry or proposed entry into Australia. Another gap exists in relation to charging personnel with patronising a prostitute. Nor is there an express offence of sexual exploitation.

With the example of the United States, it has been shown that without law that expressly allows for extraterritorial jurisdiction, even with the existence of substantive crimes provisions, it is not possible to prosecute a national for an offence committed extraterritorially.

With regards to substantive law, it is evident that United States has much to work with, and yet is lacking many criminal offences in its legislation that applies to crimes committed by peacekeeping personnel. The UCMJ and the US Code offer some provisions that could be extremely effective in the prevention and punishment of some gender-based crimes, if applied. Military law has been boosted recently by the addition of the crime of patronising a prostitute. Yet there are also many crimes simply not covered under US law, such as sexual slavery and sexual exploitation.

The most obvious gap in both jurisdictions is a lack of provisions prohibiting sexual exploitation. Sexual exploitation is the allegation most commonly brought against peacekeeping personnel, and therefore it is vital that states who contribute personnel to missions have legislation to enable prosecution of personnel who engage in sexual exploitation. While other gender-based crimes may be adequately covered in legislative provisions, the prohibition of sexual exploitation in criminal legislation is simply non-existent. This is despite the encouragement of the General Assembly and the inclusion of the new sections within the MoU requiring sending states to take all steps to ensure the state is able to prosecute personnel for sexual exploitation. The adoption of the Draft Convention will

be one further step toward ensuring that states criminalise this behaviour, by requiring state parties to criminalise sexual exploitation, as well as offering a definition that can be adopted by states into their legislation to guarantee that legislative provisions are comprehensive.

5. International Criminal Court Jurisdiction

5.1. Introduction

The preceding chapters in this thesis have looked at the problem of gender-based violence against women by peacekeepers: why such violence is a violation of women's rights and should be criminalised; what actions the UN has been taking to prevent and punish this conduct; and how national jurisdictions can prevent and punish these crimes. Given the international nature of peace support operations, there is another jurisdictional option to examine for potential prosecutions of personnel: international criminal jurisdiction. This chapter undertakes such an examination.

Although it is recognised that the international criminal system is broader than just the International Criminal Court, only the ICC will be considered as a potential forum for bringing peacekeeping personnel to justice. This is based on the fact that the ICC is a permanent court, while the *ad hoc* and internationalised tribunals all have limited jurisdiction, *ratione personae*, *ratione loci* and *ratione temporis*.¹⁰¹⁹ Where, for example, the International Criminal Tribunal for the Former Yugoslavia (ICTY) has the "power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991",¹⁰²⁰ the ICC maintains jurisdiction over crimes committed within the territory of any state party,¹⁰²¹ committed after the entry into force of the Rome Statute (1 July 2002).¹⁰²² The ICC may also exercise jurisdiction over crimes committed by a national of a state party, regardless of where the crime was

¹⁰¹⁹ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by S/RES/827 (1993), Article 1; Statute of the International Tribunal for Rwanda, adopted by S/RES/ 955 (1994), Article 1; Statute of the Special Court for Sierra Leone, 16 January 2002, Article 1(1); Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Article 1; Statute of the Special Tribunal for Lebanon, S/RES/1757 (2007), Article 1.

¹⁰²⁰ ICTY Statute, Article 1.

¹⁰²¹ Rome Statute of the International Criminal Court, 2187 UNTS 90, entered into force 1 July 2002, Article 12(2)(a).

¹⁰²² Rome Statute, Article 11(1). Article 11(2) qualifies this: if a state becomes a party to the Rome Statute after its entry into force, the Court will only have jurisdiction over crime committed after the entry into force of the Statute for that state.

committed.¹⁰²³ Even more broadly, the ICC may exercise jurisdiction if the Security Council has referred a situation to the Prosecutor, regardless of where the crimes took place or the nationality of the perpetrator(s).¹⁰²⁴ Thus it is evident that, while the Rome Statute ensures certain restrictions upon the exercise of jurisdiction by the Court, the ICC has relatively broad jurisdiction. These restrictions, however, will be of importance when the ICC's jurisdiction over peacekeeping personnel is considered. Unless the situation is referred by the Security Council, the crime must either have been committed by a national of a state party or within the territory of a state party.¹⁰²⁵ Analysis in this chapter is based on the assumption that preconditions to the exercise of jurisdiction by the ICC under Article 12 of the Rome Statute are met.¹⁰²⁶

There are many different challenges that may arise with regards to prosecution of perpetrators of international crimes before the International Criminal Court (ICC). This chapter will not address every possible issue, but rather will analyse a small number of challenges that present themselves in relation to the specific perpetrators (peacekeeping personnel) and crimes (rape, sexual slavery, trafficking-related offences, prostitution-related offences, and sexual exploitation) dealt with in this thesis. These will be the considerations that would ultimately grant the ICC jurisdiction over a peacekeeper- or demonstrate that the ICC is an unlikely or even impossible forum before which to prosecute such perpetrators for such crimes. The areas that will be considered are: substantive law issues concerning the definition of crimes; individual criminal responsibility and superior/command responsibility; immunities; and the jurisdictional aspects of prosecutorial discretion with particular regard to gravity.

¹⁰²³ Rome Statute, Article 12(2)(b). See S.A. Williams and W.A. Schabas, 'Article 12 Precondition to the exercise of jurisdiction', in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., (C.H.Beck, Hart, Nomos, Muenchen, Oxford, Baden-Baden 2008), 547-561.

¹⁰²⁴ Rome Statute, Article 13(b). This includes crimes committed in the territory of a non-state party; see Security Council Resolution 1593 of 31 March 2005, on Reports of the Secretary-General on the Sudan, referring the situation of Darfur, Sudan, to the ICC; S/RES/1593 (2005); *Prosecutor v Al Bashir*, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (4 March 2009), para. 40, in which the Pre-Trial Chamber held the case to fall within the jurisdiction of the Court due to the Security Council referral.

¹⁰²⁵ Article 12 of the Rome Statute.

¹⁰²⁶ See H.-P. Kaul, 'Preconditions to the Exercise of Jurisdiction', in Cassese, et al. (eds.), *The Rome Statute of the International Criminal Court*, Vol. I, (Oxford University Press, Oxford 2002), 583-618.

It may first be asked whether bringing peacekeeping personnel to justice is part of the aim and role of the ICC. The ICC was established with the purposes of bringing an end to impunity for perpetrators of war crimes, crimes against humanity and genocide, and preventing said crimes.¹⁰²⁷ It was envisaged as a 'court of last resort'; that is, a court to step in and prosecute perpetrators when national jurisdictions are genuinely unable or unwilling to do so.¹⁰²⁸ Complementarity remains a crucial aspect of the Court.¹⁰²⁹ In fact, as the Court has progressed in its first years of existence, there has been a development towards emphasising the ICC not just as a court, but as a system of international criminal justice, of which states are an integral element.¹⁰³⁰ That system aims to promote national courts as the primary jurisdiction for prosecution of perpetrators,¹⁰³¹ and at the same time recognises that when the ICC exercises its jurisdiction, it cannot do so without the cooperation of states. The role of national jurisdictions in prosecuting peacekeeping personnel for gender-based crimes has been examined in Chapter 4, and now it remains to be examined what role the ICC may have.

¹⁰²⁷ Rome Statute, Preamble, para. 5. The crime of aggression will also be under the jurisdiction of the Court, should a definition be formulated; article 5(2) Rome Statute.

¹⁰²⁸ Rome Statute, Article 17. L.N. Sadat, *The International Criminal Court and the Transformation of International Law*, (Transnational Publishers, Inc., Ardsley, New York 2002), pp. 123-4.

¹⁰²⁹ Complementarity is the idea that the ICC will complement national courts. Primacy is given to national courts as the forum in which to prosecute perpetrators of heinous crimes. The Preamble of the Rome Statute states that the Court "shall be complementary to national criminal jurisdiction"; see also Articles 1 and 17. See e.g. M.A. Newton, 'Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court' (2001) *Military Law Review* 20-73; Sadat, *ibid.*, p. 119; J.T. Holmes, 'Complementarity: National Courts versus the ICC', in Cassese, et al. (eds.), *The Rome Statute of the International Criminal Court*, Vol. I, (Oxford University Press, Oxford 2002), 667-686; T.N. Slade and R.S. Clark, 'Preamble and Final Clauses', in Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, (Kluwer Law International, The Hague 2002), 421-450, p. 428; M.C. Bassiouni, *Introduction to International Criminal Law*, (Transnational Publishers, Inc., Ardsley, New York 2003), pp. 500-1.

¹⁰³⁰ Fatou Bensouda, 'Concluding Remarks', Fighting Impunity in a Fragmented World- New Challenges for the International Criminal Court, European University Institute, 24 May 2008, Florence, Italy. Some authors have suggested an even greater role for states, with the ICC acting in a role of assistant to domestic prosecution: M.S. Ellis, 'The International Criminal Court and Its Implication for Domestic Law and National Capacity Building' (2002) 15 (2) *Florida Journal of International Law* 215-242; W.W. Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' (2008) 49 (1) *Harvard International Law Journal* 53-108; M.S. Ellis, 'International Justice and the Rule of Law: Strengthening the ICC through Domestic Prosecutions' (2009) 1 (1) *Hague Journal on the Rule of Law* 79-86.

¹⁰³¹ The Preamble of the Rome Statute states that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" (para. 6). Cryer questions the status of this duty, however, as it has "no basis in the operative part of the treaty"; R. Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, (Cambridge University Press, Cambridge 2005), pp. 171-2; J.K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, (Oxford University Press, Oxford 2008), pp. 100-101.

Chapter 4 demonstrated that gaps in national jurisdiction over peacekeeping personnel exist. If the ICC was established to fill these gaps, when states are unable (or unwilling) to undertake prosecution of peacekeeping personnel who commit crimes within the jurisdiction of the ICC, the ICC should be willing to step in and exercise its jurisdiction. The ICC aims to eliminate impunity for international crimes, and there should be no exception for peacekeeping personnel who commit crimes within the jurisdiction of the Court. The discussion in this chapter of prosecutorial discretion and the application of the gravity threshold will consider the question of whether peacekeeping personnel and the crimes they commit should be considered by the Office of the Prosecutor as the type of perpetrator and crime(s) for the ICC to expend resources on. It is the argument of this chapter that crimes committed by peacekeeping personnel should be seen to satisfy the gravity threshold of the Rome Statute.

This thesis examines individual criminal responsibility of the peacekeeper, and not the civil responsibility of any other entity such as the perpetrator's sending state, or the UN itself (as represented by the PSO).¹⁰³² It is now universally recognised that individual criminal responsibility for violations of international law such as international humanitarian law and human rights norms is valid and necessary.¹⁰³³ The responsibility for the crime is individual, as the harm is caused by a natural person.¹⁰³⁴ The reasoning behind enforcement of individual criminal responsibility for harm¹⁰³⁵ is multiple-fold. Retribution and deterrence are the two main reasons; alongside rehabilitation, incapacitation, and reconciliation. Retribution may be in the vein of restorative justice,

¹⁰³² For commentary on state and organisational responsibility in PSOs, see M. Zwanenburg, *Accountability of Peace Support Operations*, Vol. 9, (Martinus Nijhoff Publishers, Leiden 2005), pp. 51-129.

¹⁰³³ K. Ambos, 'Individual Criminal Responsibility in International Criminal Law: A Jurisprudential Analysis-From Nuremberg to the Hague', in Kirk McDonald and Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts*, (Kluwer Law International, The Hague 2000), p. 6.

¹⁰³⁴ A. Eser, 'Individual Criminal Responsibility', in Cassese, et al. (eds.), *The Rome Statute of the International Criminal Court*, Vol. I, (Oxford University Press, Oxford 2002), 767-822, p. 770; O. Triffterer, 'Preliminary Remarks: The Permanent International Criminal Court- Ideal and Reality', in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., (C.H. Beck, Hart, Nomos, Muenchen, Oxford, Baden-Baden 2008), p. 25.

¹⁰³⁵ Triffterer, 'Preliminary Remarks', *ibid.*, p. 25.

to rectify the moral balance because punishment is deserved,¹⁰³⁶ and not just the enactment of punishment as vengeance. "From a deterrence perspective, punishment is inflicted not because the offender deserves it, but because punishment has a consequential or utilitarian value, in this case the value of minimizing recidivism."¹⁰³⁷ In the case of peacekeeper perpetrators, accountability would primarily exist as a method of deterrence- criminalising sexual exploitation, ensuring accountability, in order to deter future personnel from committing such offences. This forms part of the overall aim of prevention of sexual exploitation and abuse that the UN is seeking.¹⁰³⁸ Retribution would also be a reason; punishment is deserved for the violations of rights committed through sexual exploitation and abuse.¹⁰³⁹ In the same regard, punishment would hopefully be a method of rehabilitation; through accountability, the perpetrator can acknowledge the harm caused by their actions.¹⁰⁴⁰

The analysis of substantive law jurisdiction in this chapter will examine war crimes and crimes against humanity. Genocide will not be addressed, as it is considered highly unlikely that a peacekeeper will engage in genocide. This is based on two premises, the first being that peacekeeping personnel seldom find themselves located in the region of a genocide (although this may occur, such as UNAMIR¹⁰⁴¹ in Rwanda and UNAMID¹⁰⁴² in Sudan).¹⁰⁴³ The second and principal reason is that genocide requires a mental element of specific intent¹⁰⁴⁴ to destroy a group in whole or in part, the *dolus specialis*.¹⁰⁴⁵ It is unlikely that a peacekeeper would have this intent; given the lack of

¹⁰³⁶ M.A. Drumbl, 'A Hard Look at the Soft Theory of International Criminal Law', in Sadat and Scharf (eds.), *The Theory and Practice of International Law*, (Martinus Nijhoff Publishers, Leiden 2008), 1-18, p. 11.

¹⁰³⁷ *Ibid.*, p. 14.

¹⁰³⁸ See *supra* Chapter 3.

¹⁰³⁹ G. Werle, *Principles of International Criminal Law*, 2nd ed., (T.M.C. Asser Press, The Hague 2009), *supra* note 597, pp. 34-36; *Prosecutor v Kupreškić*, Trial Judgement, IT-95-16-T (14 January 2000), paras. 848-849.

¹⁰⁴⁰ *Ibid.*

¹⁰⁴¹ United Nations Mission in Rwanda.

¹⁰⁴² African Union-United Nations Hybrid Operation in Darfur.

¹⁰⁴³ Out of 63 missions past and present, only a handful have taken place in the context of what has been termed (sometimes controversially) genocide, such as Rwanda, the former Yugoslavia and Sudan. The ICTY and ICTR have convictions for genocide; e.g. *Prosecutor v Krstić*, Trial Judgement, IT-98-33-T, 2 August 2001; *Prosecutor v Akayesu*, Trial Judgement, ICTR-96-4-T, 2 September 1998.

¹⁰⁴⁴ W.A. Schabas, 'The Jelisić Case and the Mens Rea of the Crime of Genocide' (2001) 14 *Leiden Journal of International Law* 125-139, pp. 128-129.

¹⁰⁴⁵ Article 6 Rome Statute; *Prosecutor v Akayesu*, Trial Judgement, ICTR-96-4-T (2 September 1998), para. 498; A. Cassese, 'Genocide', in Cassese, et al. (eds.), *The Rome Statute of the International Criminal Court*, (Oxford University Press, Oxford 2002), 335-352; Werle, *supra* note 1039, pp. 274-281; W.A. Schabas, 'Article 6 Genocide', in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed.,

connection a peacekeeper would have with the group in question- there is no history for a peacekeeper to have developed a discriminatory hatred of a group to the extent of forming intent to destroy that group in whole or in part. Genocidal situations exist in circumstances of years of inter-group animosity, discrimination and hatred.¹⁰⁴⁶ In contrast, crimes such as sexual exploitation are committed for reasons of power and sexual satisfaction.¹⁰⁴⁷

It is very difficult to prove the specific intent to destroy required for the commission of genocide, and the *ad hoc* tribunals have determined the specific intent from such evidence as the accused's statements and deeds, the existence of a plan, a large number of victims, the behaviour of the perpetrator when committing the crime, the methodical way of planning, the systematic manner of killing, and the fact that victims were selected due to their membership of a particular group.¹⁰⁴⁸ All of this must be committed in a broader "context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction", such context including "the initial acts in an emerging pattern".¹⁰⁴⁹

Henceforth, this chapter will look at war crimes and crimes against humanity as potential categories of international crimes under which to prosecute peacekeeping personnel.¹⁰⁵⁰ Both will be examined in order to provide options for prosecution for crimes committed under different circumstances: a PSO may be located in a territory in the midst of armed conflict, but may also be situated in post-conflict territory. Therefore, the application of the jurisdiction of war crimes may not be so apparent.

(C.H. Beck, Hart, Nomos, Muenchen, Oxford, Baden-Baden 2008), ; A. Cassese, *International Criminal Law*, 2nd ed., (Oxford University Press, Oxford 2008), p. 137.

¹⁰⁴⁶ E.g. O. Triffterer, 'Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such' (2001) 14 *Leiden Journal of International Law* 399-408, pp. 400-401 with reference to the years of 'Aryan race' domination intention of Hitler before and during World War II.

¹⁰⁴⁷ *Supra* Chapter 2; see also C.A. MacKinnon, *Feminism Unmodified*, (Harvard University Press, Cambridge, Mass., London 1987), Chapter 7 Sex and Violence: A Perspective, pp. 85-92; *Prosecutor v Sesay, Kallon and Gbao (RUF Case)*, SCSL-04-15-T, Trial Judgement (2 March 2009), para. 1348.

¹⁰⁴⁸ See e.g. *Akayesu*, Trial Judgement, para. 523; *Prosecutor v Kayishema and Ruzindana*, Trial Judgement, ICTR-95-1-T (21 May 1999) para. 93; *Prosecutor v Jelusic*, Trial Judgement, IT-95-10-T (14 December 1999) para. 73.

¹⁰⁴⁹ Elements of Crimes, Article 6 Genocide, Introduction. The word 'plan' was rejected by drafters, in line with jurisprudence of the *ad hoc* tribunals, which does not require a plan or policy, although it has been recognised that "it is not easy to carry out genocide without such a plan, or organisation"; *Kayishema and Ruzindana*, Trial Judgement, para. 94; Schabas, 'The Jelusic Case', *supra* note 1044, p. 134.

¹⁰⁵⁰ Articles 7 and 8 Rome Statute.

An examination of the chapeau elements of war crimes and crimes against humanity will demonstrate where the difficulties may lie in this respect.

In addition to the chapeau elements of war crimes and crimes against humanity, the individual elements of crimes will be examined.¹⁰⁵¹ This will demonstrate whether the ICC has substantive law jurisdiction over rape, trafficking, sexual slavery, sexual exploitation and prostitution-related offences. Analysis will be made as to whether this jurisdiction is sufficient or whether there are any lacunae. Within the assessment of individual elements of crimes, different categories of potential individual criminal responsibility will be presented.¹⁰⁵² Following this, the responsibility of commanders and superiors will be considered as a prospective category of responsibility with which to prosecute peacekeeping personnel.¹⁰⁵³

However, should the substantive law and categories of responsibility be appropriate and adequate with which to prosecute peacekeeping personnel, there are other potential roadblocks on the path to the Trial Chamber. These include immunities of peacekeeping personnel. Such immunities have been discussed in Chapter 3, including the fact that military personnel have absolute immunity.¹⁰⁵⁴ Immunity has a specific relevance with regards to the Rome Statute, which has express provisions dealing with immunities. Assuming that the hurdle of immunities is cleared, there still remains the fact that the Prosecutor of the ICC has discretion over which cases he brings before the Court, and aspects of this discretion may prove particularly problematic when considering peacekeeping personnel as potential ICC defendants.

All of these potential issues will be analysed, with the aim of bringing about a general conclusion as to the likelihood of prosecution of peacekeeping personnel in the ICC.

¹⁰⁵¹ *Ibid.*

¹⁰⁵² Article 25 Rome Statute.

¹⁰⁵³ Article 28 Rome Statute.

¹⁰⁵⁴ *See also* Appendix 2.

5.2. *International Crimes*

International crimes have been viewed by some as any crime included in a treaty which includes a duty or right to extradite.¹⁰⁵⁵ However, this thesis takes a more restrictive definitional approach to international criminal law, as followed by Broomhall and Cryer: the “body of international law that imposes criminal responsibility directly upon the individual, without the necessary interposition of national legal systems”.¹⁰⁵⁶ This is the system of international criminal responsibility established, beginning with the Nuremberg International Military Tribunal, through the *ad hoc* tribunals, culminating in the ICC.¹⁰⁵⁷ International crimes fall under four categories: genocide, crimes against humanity, war crimes, and aggression. Such crimes are defined as international because they are crimes that shock the conscious of humanity, and are committed against the world community as a whole, constituting a threat to international peace and security.¹⁰⁵⁸ They are also so defined because they generally occur on a large scale, a fact that distinguishes them from ordinary domestic crimes. This large scale is demonstrated by the examples of crimes committed during World War II, the Balkan conflict, the Rwandan genocide, and the current situations before the ICC such as Sudan and Uganda.¹⁰⁵⁹

While the individual elements of crimes are important, so are the unique chapeau elements of crimes under the Rome Statute. This section will examine the chapeau elements of war crimes and crimes against humanity in the context of crimes committed by peacekeeping personnel, pointing out problematic areas that may arise for their prosecution. These chapeau elements are what demonstrate the difference of international crimes- namely, elements of crimes being committed on

¹⁰⁵⁵ Bassiouni, *supra* note 1029, pp. 114-133.

¹⁰⁵⁶ B. Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*, 2nd ed., (Oxford University Press, Oxford 2003), pp. 9-10; Cryer, *Prosecuting International Crimes*, *supra* note 1031, pp. 9-10.

¹⁰⁵⁷ For a summary of the development of international criminal law, *see* Cryer, *ibid.*, pp. 9-72.

¹⁰⁵⁸ Bassiouni, *supra* note 1029, pp. 119, 121.

¹⁰⁵⁹ Werle, *supra* note 1039, pp. 31-2.

a large-scale, systematically, or part of a plan or policy. However, this is not necessarily the case with war crimes, as a single occurrence of a war crime is still considered an international crime.¹⁰⁶⁰

5.2.1. Crimes against Humanity

There are two chapeau elements of a crime against humanity, which must be proven in addition to the individual elements of crimes as discussed *infra*. These chapeau elements are likely to be the principal reason why it would be very difficult to charge a peacekeeper with crimes against humanity. The chapeau elements concern the context of the crimes committed.

Unlike war crimes, what is not required is a nexus with armed conflict.¹⁰⁶¹ The removal of this nexus is a departure from the definition of crimes against humanity under the Nuremberg Tribunal Statute.¹⁰⁶² Such as nexus was not included in the definition of crimes against humanity of the *ad hoc* tribunals.¹⁰⁶³ The lack of a nexus to armed conflict has been considered by the ICTY as to be the current formulation of customary international law,¹⁰⁶⁴ and that is reflected in the Rome Statute.¹⁰⁶⁵ Rather than associating them with armed conflict, crimes against humanity may be viewed as a violation of human rights on a massive scale.¹⁰⁶⁶

5.2.1.1. Widespread or Systematic Attack directed against Civilian Population

The first chapeau element of crimes against humanity is that the crime is committed as part of a widespread or systematic attack directed against a civilian population. The words 'widespread' and

¹⁰⁶⁰ Although the Rome Statute does grant jurisdiction over war crimes 'in particular' when committed as part of a large-scale commission of such crimes. See discussion *infra*.

¹⁰⁶¹ Meron, 'Crimes Under the Jurisdiction of the ICC', *supra* note 1011, p. 49; Cassese, 'Crimes against Humanity', *supra* note 1011, p. 356.

¹⁰⁶² T.L.H. McCormack and S. Robertson, 'Jurisdictional Aspects of the Rome Statute for the New International Criminal Court' (1999) 23 *Melbourne University Law Review* 635-666, pp. 652-3.

¹⁰⁶³ Article 5 ICTY Statute, Article 3 ICTR Statute, Article 2 SCSL Statute, Article 5 Law on ECCC.

¹⁰⁶⁴ *Prosecutor v Tadic*, Trial Judgement, IT-94-1-T (7 May 1997), para. 627.

¹⁰⁶⁵ von Hebel and Robinson, *supra* note 1011, pp. 92-93; W. Rückert and G. Witschel, 'Genocide and Crimes Against Humanity in the Elements of Crimes', in Fischer, et al. (eds.), *International and National Prosecution of Crimes Under International Law*, (Berlin Verlag, Berlin 2001), p. 71.

¹⁰⁶⁶ Cassese, *International Criminal Law*, *supra* note 1045, p. 99.

'systematic' are disjunctive, meaning that the crime must be committed as part of either a widespread attack or a systematic attack directed against a civilian population.¹⁰⁶⁷

'Widespread' is not a reference to geographical location, but to the number of victims.¹⁰⁶⁸ The *ad hoc* tribunals have given the term an expansive definition covering "the large-scale nature of the attack and the number of targeted persons."¹⁰⁶⁹ A systematic attack is one with "organised nature of the acts of violence and... improbability of their random occurrence",¹⁰⁷⁰ showing "patterns of crimes, in the sense of the non-accidental repetition of similar criminal conduct on a regular basis".¹⁰⁷¹ The term "reflects the organised nature of the attack, excludes random violence, and does not require a policy or plan".¹⁰⁷²

It is only the attack that must be widespread or systematic.¹⁰⁷³ The criminal behaviour of the accused may be a single act or limited number of acts occurring in the context of the attack against a civilian population, and cannot be isolated or random.¹⁰⁷⁴ The targeted civilian population must also be specified. In the *RUF Case*, the Special Court for Sierra Leone (SCSL) examined whether the killing of peacekeeping personnel fell within the scope of crimes against humanity. Trial Chamber I held that "the attacks against UNAMSIL¹⁰⁷⁵ personnel were geographically and temporally removed from the crimes against civilians" found proven under other charges in the case.¹⁰⁷⁶ It was found that the

¹⁰⁶⁷ *Ibid*; Meron, 'Crimes Under the Jurisdiction of the ICC', *supra* note 1011, p. 50; von Hebel and Robinson, *supra* note 1011, pp. 94-95; Robinson, 'The Context', *supra* note 1011, p. 63; Cassese, 'Crimes against Humanity', *supra* note 1011, p. 366; Dixon and Hall, *supra* note 1011, pp. 176-178. *RUF Case*, para. 78.

¹⁰⁶⁸ Dixon and Hall, *ibid.*, p. 178.

¹⁰⁶⁹ *Prosecutor v Kordic*, Appeal Judgement, IT-95/14/2-A (17 December 2004), para. 94. *See also Prosecutor v Blaskic*, Appeal Judgement, IT-95-14-A (29 July 2004), para. 101; *Prosecutor v Kunarac et al. (Foca)*, Appeals Chamber Judgement, IT-96-23-A (12 June 2002), para. 94. The ICTR has used almost identical language: "the scale of the attacks and the multiplicity of the victims"; *Prosecutor v Muyunyi*, Trial Judgement, ICTR-00-55A-T (12 September 2006), para. 512; *Prosecutor v Muhimana*, Trial Judgement, ICTR-95-1B-T (28 April 2005), para. 527; *Prosecutor v Semanza*, Trial Judgement, ICTR-97-20-T (15 May 2003), para. 329; *Prosecutor v Musema*, Trial Judgement, ICTR-96-13-A (27 January 2000), paras. 203-4. *See also Prosecutor v Katanga and Ngudjolo Chui*, Decision on the confirmation of charges, ICC-01/04-01/07 (30 September 2008), para. 394.

¹⁰⁷⁰ *Kordic*, Trial Judgement, para. 94; *Blaskic*, Appeal Judgement, para. 101; *Foca*, Appeal Judgement, para. 96; *RUF Case*, para. 78. *See also Katanga and Chui*, confirmation of charges, paras. 394, 397.

¹⁰⁷¹ *Ibid.*

¹⁰⁷² *Muyunyi*, Trial Judgement, para. 512; *RUF Case*, para. 79; A. Marston Danner, 'Constructing a Hierarchy of Crimes in International Criminal Law Sentencing' (2001) 87 (3) *Virginia Law Review* 415-501, p. 474.

¹⁰⁷³ *Kordic*, Trial Judgement, para. 94; *Blaskic*, Appeal Judgement, para. 101; *Foca*, Appeal Judgement, para. 96.

¹⁰⁷⁴ *Ibid*; *Tadic*, Trial Judgement, para. 649.

¹⁰⁷⁵ United Nations Mission in Sierra Leone.

¹⁰⁷⁶ *RUF Case*, para. 1952.

peacekeeping personnel were not killed in connection with these other crimes or further crimes against civilians. The categorisation of the peacekeeping personnel was actually distinguished from the civilians of Sierra Leone- they were civilian peacekeeping personnel, but not the civilian population that was the target of the widespread or systematic attack.¹⁰⁷⁷ Thus, despite the fact that the peacekeeping personnel were held to be civilians, the Trial Chamber held that the attacks were “distinct from and did not form part of the widespread or systematic attack on the civilian population of Sierra Leone”.¹⁰⁷⁸

Whether a crime committed by a peacekeeper was part of a widespread or systematic attack would depend upon the circumstances in which the crime was committed.¹⁰⁷⁹ If widespread or systematic crimes are ongoing, then a crime committed by a peacekeeper could be seen to be part of that attack on the civilian population. It is highly unlikely that a peacekeeper would *intend* their crime to be part of the attack, but it would certainly be committed *as part of* the attack if that attack is extant. It is also unlikely that a peacekeeper would commit a crime against humanity. This is due to the fact that peacekeeping missions do not generally take place in the context of a widespread or systematic attack on a civilian population. This does not mean they cannot take place in such a context: Rwanda (UNAMIR) and Sudan (UNMIS, UNAMID) are examples of missions that were or are located in territories experiencing widespread or systematic attacks on a civilian population. However the greatest difficulty in determining whether a crime by a peacekeeper constitutes a crime against humanity lies in the fact that crimes by peacekeeping personnel “tend to be isolated and sporadic acts of military indiscipline or indifference”, rather than part of a widespread or systematic attack.¹⁰⁸⁰

In the instance of a mission located in a post-conflict territory no longer experiencing a widespread or systematic attack on a civilian population, a crime committed by a peacekeeper could not be considered a crime against humanity, because it would not fulfil the first chapeau element. Unlike

¹⁰⁷⁷ *Ibid.*, paras. 1953-4.

¹⁰⁷⁸ *Ibid.*, para. 1953.

¹⁰⁷⁹ The attack does not have to be a military attack. Elements of Crimes Article 7 Introduction para. 3; Robinson, ‘The Context’, *supra* note 1011, p. 74.

¹⁰⁸⁰ J.N. Maogoto, ‘Watching the Watchdogs: Holding the UN Accountable for Violations of International Humanitarian Law by the ‘Blue Helmets’ (2000) 5 (1) *Deakin Law Review* 47-80, p. 74.

the definition of war crimes, in which a war crime is committed *in the context of and associated with* an armed conflict, a crime against humanity must be committed *as part of* the widespread or systematic attack. This difference in wording demonstrates that the war crimes nexus with armed conflict is broader than the crimes against humanity nexus with an attack. A crime committed by a peacekeeper would have to be analysed in its context, and an isolated incident would not amount to a crime against humanity.¹⁰⁸¹ A crime committed after the cessation of the widespread or systematic attack does not constitute a crime against humanity,¹⁰⁸² because the emphasis of the crime would then be on the victim as an individual, rather than the victim as part of a collective, which is the essence of a crime against humanity.¹⁰⁸³ The victim would not be chosen because of their “membership of a targeted civilian population”, and therefore the crime committed would constitute an isolated incident, but not a crime against humanity.¹⁰⁸⁴

5.2.1.2. Knowledge of or Intention that Conduct was Part of Widespread or Systematic Attack

The second chapeau element of crimes against humanity is that the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.¹⁰⁸⁵ Knowledge of the attack does not require “proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organisation.”¹⁰⁸⁶ Indeed the majority of peacekeeping personnel would not be aware of the details of a plan or policy of a widespread or systematic attack, as they would not be interacting directly with those who were organising the plan or policy. However it is something that those in superior positions within the mission may well be aware of, given their role in interacting directly with any leaders or commanders of parties to the conflict or other relevant groups. This was the case

¹⁰⁸¹ Cassese, ‘Crimes against Humanity’, *supra* note 1011, p. 361.

¹⁰⁸² Depending on the circumstances, it may constitute a war crime.

¹⁰⁸³ *Tadic*, Trial Judgement, para. 644.

¹⁰⁸⁴ *Ibid.*

¹⁰⁸⁵ von Hebel and Robinson, *supra* note 1011, p. 98.

¹⁰⁸⁶ Paragraph 2 of the Introduction to Article 7 of the Elements of Crimes; *Katanga and Chui*, confirmation of charges, para. 401; Robinson, ‘The Context’, *supra* note 1011, p. 72; Cassese, *International Criminal Law*, *supra* note 1045, p. 115.

for General Dallaire in Rwanda prior to and following the commencement of the genocide.¹⁰⁸⁷ Thus a Head of Mission, Force Commander and immediate deputies would be aware of the existence of a widespread or systematic attack including aspects of a plan or policy.

What the perpetrator must know are the factual circumstances- that there is an attack on a civilian population, and that his/her acts formed part of that attack.¹⁰⁸⁸ The perpetrator's knowledge of the attack and awareness that his/her conduct formed part of that attack can be determined from the contextual circumstances, such as the accused's position in the military hierarchy, his presence at the scene of the crimes, and the general historical and political environment in which the acts occurred.¹⁰⁸⁹ The identification of such knowledge would be similar to the knowledge of armed conflict, and would be ascertained from the context of the commission of the crimes as well as the context of the PSO itself. The commission of crimes against humanity, an attack on a civilian population, would be the reason behind the decision of the Security Council to establish a PSO, and therefore the very reason personnel are present in that territory. Personnel would be made aware of the situation on the ground, and the general historical and political environment, thus making it very difficult to argue they had no knowledge of an attack on a civilian population and that their act was part of that widespread or systematic attack.¹⁰⁹⁰

The requirement of knowledge or intention is disjunctive, indicating that a perpetrator may commit a crime without the intention that such conduct be part of the widespread or systematic attack.¹⁰⁹¹ However, should they have knowledge of the attack, even without that specific intent, the perpetrator will still be found guilty of committing a crime against humanity if their crime is committed in the context of the attack.

¹⁰⁸⁷ In January 2004 Dallaire testified at the trial of Bagosora, the 'mastermind' of the genocide; *Prosecutor v Bagosora*, Trial Judgement, ICTR-98-41-T (18 December 2008), para. 181 fn. 200.

¹⁰⁸⁸ *Katanga and Chui*, confirmation of charges, para. 401; *Prosecutor v Kordic*, Appeal Judgement, IT-95/14/2-A (17 December 2004), para. 99; *Blaskic*, Appeal Chamber Judgement, para. 124; *Semanza*, Trial Judgement, para. 332; *Tadic*, Trial Judgement, para. 657; *Prosecutor v Tadic*, Appeal Judgement, IT-94-1-A (15 July 1999) para. 266. Cassese, 'Crimes against Humanity', *supra* note 1011, p. 365.

¹⁰⁸⁹ *Katanga and Chui*, confirmation of charges, para. 402.

¹⁰⁹⁰ *Prosecutor v Kayishema and Ruzidana*, Judgement and Sentence, ICTR-95-1-T (21 May 1999), paras. 133-4.

¹⁰⁹¹ Of course they would still require the general intent to commit the crime; Article 30 Rome Statute.

There are definitive challenges to prosecuting a peacekeeper for crimes against humanity in the ICC due to the chapeau elements. A charge of crimes against humanity would be infinitely more difficult than one under war crimes, due to the required elements of systematic or widespread attack. It would be a rare instance where the Court would find a peacekeeper committing a crime that constituted part of a systematic or widespread attack.

5.2.2. War Crimes

5.2.2.1. ‘Part of a Plan or Policy or Part of a Large-Scale Commission of Such Crimes’

Under Article 8(1) of the Rome Statute there is no absolute requirement that a war crime be committed on a large-scale. Article 8(1) states that the “Court shall have jurisdiction in respect of war crimes *in particular* when committed as part of a plan or policy or as part of a large-scale commission of such crimes”.¹⁰⁹² The Prosecutor has accurately acknowledged that “[t]his threshold is not an element of the crime, and the words “in particular” suggest that this is not a strict requirement”.¹⁰⁹³ In its statutory interpretation of Article 17(1)(d) in the *Ntaganda* Arrest Warrant Appeal, the Appeals Chamber confirmed this interpretation of the Rome Statute, declaring that “the requirement of either large-scale commission or part of a policy is not absolute but qualified by the expression ‘in particular’”.¹⁰⁹⁴ It should be perceived as a guideline rather than a requirement.¹⁰⁹⁵ Therefore a single occurrence of a war crime is sufficient for the ICC to establish jurisdiction.¹⁰⁹⁶ The expression ‘in

¹⁰⁹² Emphasis added.

¹⁰⁹³ Prosecutor’s communication response to communications concerning the situation in Iraq (9 February 2006) available at <http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf> (Iraq Communication). See also Meron, ‘Crimes Under the Jurisdiction of the ICC’, *supra* note 1011, p. 52; P. Rowe, ‘War Crimes’, in McGoldrick, et al. (eds.), *The Permanent International Criminal Court*, (Hart Publishing, Oxford and Portland Oregon 2004), 203-230, pp. 205-6.

¹⁰⁹⁴ *Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58”*, Appeals Chamber, ICC-01/04 (13 July 2006) (*Ntaganda* Arrest Warrant Appeal), para. 70. It is clear that the intention of drafters was not to render ‘part of a plan or policy or part of a large-scale commission’ as an absolute requirement as they specifically chose the wording ‘*in particular* when committed...’ over ‘*only* when committed as part of...’ (emphasis added); von Hebel and Robinson, *supra* note 1011, p. 108.

¹⁰⁹⁵ *Ibid.*, p. 124.

¹⁰⁹⁶ See discussion *infra* on gravity. This does not, however, avoid some scholars arguing that the plan or policy or large-scale commission should be an essential element of all international crimes, including war crimes: L. May, *Crimes Against Humanity: A Normative Account*, (Cambridge University Press, Cambridge 2005), pp. 80-95; K.J. Heller, ‘Situational Gravity under the Rome Statute’, in Stahn and von den Herik (eds.), *Future*

particular’ indicates that the Court will have jurisdiction over all war crimes, but especially when committed as part of a plan or policy or large-scale commission, as such large-scale or policy commission is a significant factor in defining crimes as international, at which point they amount to a threat to international peace and security. However, the fact that this is not a requirement will enable the Court to prosecute single war crimes, or war crimes not committed as part of a plan or policy or on a large-scale, and this will broaden the scope of potential crimes the Court can prosecute. In terms of crimes committed by peacekeepers, it has been shown above the difficulty that will arise in proving a peacekeeper’s crime to be a crime against humanity due to the necessity for the crime to be part of a widespread or systematic attack. A war crime avoids any similar requirement, and thus it will be far more likely that a crime by a peacekeeper is classified as a war crime.

With regard to the number of victims (large-scale commission), the ICTR has distinguished the number of victims as an element specific to crimes against humanity only. In *Semanza*,¹⁰⁹⁷ the ICTR held that the number of victims was an integral element of a crime against humanity, but not of genocide. The Chamber held that genocide was a crime with “no numeric minimum of victims”, but that the number of victims could be used as an aggravating factor in sentencing.¹⁰⁹⁸ The same principle should apply to war crimes, given that it is not a *requirement* under the Rome Statute that a war crime be committed as part of a large-scale commission of such crimes.

It is unlikely that crimes such as sexual exploitation by peacekeeping personnel will be committed as part of a plan or policy, although in some circumstances it could be argued that there is a plan to commit these crimes. Such circumstances would include the involvement of multiple peacekeeping personnel in the trafficking and sexual slavery of women, or of peacekeeping personnel who engage in protection of brothel owners in order to be able to make use of the brothel’s services. While this

Perspectives in International Criminal Justice, (TMC Asser Press, The Hague 2010), 227-253 pp. 230-233 (using the term ‘systemicity’).

¹⁰⁹⁷ *Prosecutor v Semanza* (Judgment and Sentence) ICTR-97-20-T (15 May 2005), para. 571.

¹⁰⁹⁸ *Ibid. Prosecutor v Krstic* ICTY-98-33 (2 August 2001) also referred to the number of victims as a factor in assessing the gravity of crimes committed, for sentencing; para. 702.

would also be an issue with regards to the category of criminal responsibility (e.g. it may be viewed as joint commission¹⁰⁹⁹), the context of the commission of the crime(s) can also be used to argue the existence of a plan to commit the crime(s).

While crimes committed by peacekeeping personnel may be isolated incidents, they can be placed in the broader context, and thus be committed as part of a large-scale commission of war crimes. Other crimes committed within the relevant territory should be taken into account. The context of crimes committed by peacekeeping personnel is the armed conflict in the territory within which the peacekeeping personnel are situated. The cessation of hostilities does not necessarily mean the end of the application of international humanitarian law, and thus does not mean the end of a situation of armed conflict.¹¹⁰⁰ Crimes committed by peacekeeping personnel after the cessation of hostilities can still be considered to be associated with the armed conflict, and therefore part of any large-scale commission of crimes that may have occurred during such conflict.

5.2.2.2. Nexus with Armed Conflict

To qualify as a war crime, conduct must be associated with the armed conflict, and the perpetrator needs to commit the crime in the context of an armed conflict and be aware of the existence of such conflict.¹¹⁰¹ Reference may be made to the jurisprudence of the *ad hoc* tribunals. Armed conflict was defined by the ICTY in *Tadic* as existing

“whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of

¹⁰⁹⁹ Article 25(3)(a) Rome Statute.

¹¹⁰⁰ See *infra*, text at n. 1102.

¹¹⁰¹ Article 8 Rome Statute; Elements of Crimes, ICC-ASP/1/3; M. Bothe, 'War Crimes', in Cassese, et al. (eds.), *The Rome Statute of the International Criminal Court*, Vol. I, (Oxford University Press, Oxford 2002), 379-426, pp. 388-9.

internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.”¹¹⁰²

The Tribunal’s Appeals Chamber found it to be “sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict”.¹¹⁰³

The association with armed conflict requirement of war crimes was also broadly interpreted by the ICTY in the *Foca* case:

“[T]he criterion of a nexus with the armed conflict under Article 3 of the Statute does not require that the offences be directly committed whilst fighting is actually taking place, or at the scene of combat. Humanitarian law continues to apply in the whole of the territory under the control of one of the parties, whether or not actual combat continues at the place where the events in question took place. It is therefore sufficient that the crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict. The requirement that the act be closely related to the armed conflict is satisfied if, as in the present case, the crimes are committed in the aftermath of the fighting, and until the cessation of combat activities in a certain region, and are committed in furtherance or take advantage of the situation created by the fighting.”¹¹⁰⁴

The phrase ‘in the context of’ is to be interpreted in “very general geographical and temporal terms”, following the direction of the ICTY, and ‘associated with’ demonstrates the nexus with the armed conflict.¹¹⁰⁵ The ICC has applied the broad interpretation, requiring that “the armed conflict must play a substantial role in the perpetrator’s decision, in his or her ability to commit the crime or in the

¹¹⁰² *Prosecutor v Tadic*, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction IT-94-1-AR72 (2 October 1995), para. 70.

¹¹⁰³ *Ibid.* Crimes can still be “committed in the context of an armed conflict, even if substantial clashes were not occurring in the region at the time and place that the crimes were allegedly committed”; *Celebici*, Trial Judgement, paras. 196-7.

¹¹⁰⁴ *Kunarac et al. (Foca)*, Trial Judgement, (22 February 2001), IT-96-23 and IT-96-23/1-A, para. 568. “There is no necessary correlation between the area where the actual fighting is taking place and the geographical reach of the laws of war. The laws of war apply in the whole territory of the warring states or, in the case of internal armed conflicts, the whole territory under the control of a party to the conflict, whether or not actual combat takes place there, and continue to apply until a general conclusion of peace or, in the case of internal armed conflicts, until a peaceful settlement is achieved.” *Foca*, Appeals Chamber Judgement, IT-96-23-A (12 June 2002), para. 57. Rowe, ‘War Crimes’, *supra* note 1093, p. 208.

¹¹⁰⁵ K. Dörmann, et al., ‘The Context of War Crimes’, in Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, (Transnational Publishers, Inc., Ardsley, NY 2001), 112-123, pp. 12-1.

manner in which the conduct was ultimately committed”.¹¹⁰⁶ However, the “armed conflict need not be considered the ultimate reason for the conduct and the conduct need not have taken place in the midst of battle”.¹¹⁰⁷

Crimes committed by peacekeeping personnel may fall within this expansive interpretation. Peace support operations are always located in places experiencing on-going conflict, or in a post-conflict situation. Their very presence is related to the armed conflict; that is precisely the reason the mission is in that territory. The commission of crimes such as sexual exploitation takes advantage of the situation created by the fighting, as the conflict has created a society in which women are left with no choice but to sell their bodies in order to survive.¹¹⁰⁸ Thus, it can be argued that these crimes are committed in the context of an armed conflict, and are associated with an armed conflict, even if hostilities have ceased.¹¹⁰⁹

Unfortunately, such an application to UN missions is not so simple, and it may be the case that the Court finds that the crime(s) in question do not have a nexus to armed conflict because it was committed after the cessation of hostilities- or even later in time, after the conclusion of peace, and thus concludes there is no jurisdiction under Article 8. There is much debate on the issue of peacekeeping personnel involvement in armed conflict, and whether and when they are considered to be combatants engaging in armed conflict or civilians.¹¹¹⁰ There is no clear legal stance as to the application of IHL¹¹¹¹ - that is, the exact circumstances when peacekeeping personnel are considered

¹¹⁰⁶ *Prosecutor v Lubanga*, Decision on the confirmation of charges, ICC-01/04-01/06 (29 January 2007), para. 287; *Katanga and Chui*, Confirmation of Charges, paras. 380-382.

¹¹⁰⁷ *Ibid.*

¹¹⁰⁸ See *supra* Chapter 2.

¹¹⁰⁹ It is not “necessary that the crime alleged takes place during combat, that it be part of a policy or of a practice officially endorsed or tolerated by one of the parties to the conflict, or that the act be in actual furtherance of a policy associated with the conduct of war or in the actual interest of a party to the conflict”; *Prosecutor v Tadic*, Trial Judgement, para. 573.

¹¹¹⁰ States may be unwilling to concede that their personnel have engaged in armed conflict, as upon engagement in armed conflict, peacekeepers lose their special protection as civilians and become combatants; see Article 8(2)(b)(iii) and 8(2)(e)(iii) Rome Statute.

¹¹¹¹ See U. Palwankar, 'Applicability of international humanitarian law to United Nations peace-keeping forces' (1993) (294) *International Review of the Red Cross* 227-240; C. Greenwood, 'International Humanitarian Law and United Nations Military Operations' (1998) 1 *Yearbook of International Humanitarian Law* 3-34; M.J.P. Bialke, 'United Nations Peace Operations: Applicable Norms and the Application of the Law of Armed Conflict' (2001) 50 *A.F.L. Rev.* 1-63; R. Murphy, 'United Nations Military Operations and International Humanitarian

to be engaging in armed conflict.¹¹¹² The Secretary-General's Bulletin on Observance by United Nations forces of international humanitarian law states:

"The fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence."¹¹¹³

From this, it can be deduced that whether IHL is applicable will depend on the individual mandate of the operation,¹¹¹⁴ and this may assist in interpreting whether the circumstances in which the crime is committed amounts to armed conflict. In addition to the mandate, the SCSL has suggested other elements that may assist in defining the situation:

"the specific operational mandates, the role and practices actually adopted by the peacekeeping mission during the particular conflict, their rules of engagement and operational orders, the nature of the arms and equipment used by the peacekeeping force, the interaction between the peacekeeping force and the parties involved in the conflict, any use of force between the peacekeeping force and the parties in the conflict, the nature and frequency of such force and the conduct of the alleged victim(s) and their fellow personnel."¹¹¹⁵

Law' (2003) 14 *Criminal Law Forum* 153-194; A. Faite and J.L. Grenier (eds.), *Expert Meeting on Multinational Peace Operations: Applicability of International Humanitarian Law and International Human Rights Law to UN Mandated Forces*, (International Committee of the Red Cross, Geneva 2004).

¹¹¹² 'Application of international humanitarian law and international human rights law to UN-mandated forces: Report on the Expert meeting on multinational peace operations' (2004) 86 (853) *International Review of the Red Cross* 207-212, pp. 208-9.

¹¹¹³ Secretary-General's Bulletin on Observance by United Nations forces of international humanitarian law, ST/SGB/1999/13, sub-section 1.1. It must be recalled that the Bulletin is an internal UN document, which amounts to policy, but there is disagreement as to whether it amounts to law. The Bulletin is binding on members of UN forces, but the source of the legal obligation stems from IHL rules that individual states are bound by. The Bulletin mostly applies customary rules of IHL, although some rules imposed by the Bulletin are not customary. Customary rules of IHL will of course apply, but beyond customary law, force personnel will still be bound by the law of their sending state, and states do not all apply the same rules of IHL, as not all states are members of all IHL treaties. H. McCoubrey and N.D. White, *The Blue Helmets: Legal Regulation of United Nations Military Operations*, (Dartmouth Publishing Company Limited, Aldershot 1996), pp. 161-2; D. Shrags, 'UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage' (2000) 94 (2) *American Journal of International Law* 406-412, p. 408-9; B.D. Tittemore, 'Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations' (1997) 33 *Stanford Journal of International Law* 61-117, p. 93; P. Rowe, 'Maintaining Discipline in United Nations Peace Support Operations: The Legal Quagmire for Military Contingents' (2000) 5 (1) *Journal of Conflict and Security Law* 45-62, p. 53; Faite and Grenier, *supra* note 1111, pp. 10-11.

¹¹¹⁴ Y. Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, 2nd ed., (Cambridge University Press, Cambridge 2010), pp. 29-30.

¹¹¹⁵ *RUF Case*, para. 234.

The *RUF Case* Trial Chamber held that “peacekeeping personnel are considered to be civilians only insofar as... they do not take direct part in the hostilities”.¹¹¹⁶ It also held that

“their protection would not cease if the personnel use armed force only in exercising their right to individual self-defence [and that] the use of force by peacekeeping personnel in self-defence in the discharge of their mandate, provided that it is limited to such use, would not alter or diminish the protection afforded to peacekeeping personnel”.¹¹¹⁷

However, ultimately, whether or not IHL is applicable to peacekeeping personnel may not be relevant if it is the peacekeeper committing a war crime, as a war crime may be committed by a combatant or a civilian.¹¹¹⁸ A war crime must be committed in the context of and be associated with an armed conflict, but the perpetrator does not have to be engaged as a combatant in the armed conflict.¹¹¹⁹

A problem that would arise is whether to charge a peacekeeper with a war crime committed in international or non-international armed conflict, and again there is no clear rule on this.¹¹²⁰ Clearly if the mission is mandated to exist because of an armed conflict between two states, then the armed conflict is international.¹¹²¹ However, most missions are located in one state, due to internal armed conflict, usually between government and rebel forces. One argument is that such a conflict automatically becomes international with the involvement of a multi-national peacekeeping

¹¹¹⁶ *RUF Case*, para. 233.

¹¹¹⁷ *Ibid.*

¹¹¹⁸ Dinstein, *supra* note 1114, pp. 263-4, 266; Cassese, *International Criminal Law*, *supra* note 1045, pp. 82-3; Dörmann *et al.*, *supra* note 1105, p. 119.

¹¹¹⁹ *Prosecutor v. Akayesu*, Appeal Judgement, ICTR-96-4-A (1 June 2001), paras. 443-5; K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, (Cambridge University Press, Cambridge 2002), pp. 34-35; 391-393; A. Zimmerman, 'Preliminary Remarks on para. 2 (c)-(f) and para. 3: War crimes committed in an armed conflict not of an international character', in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., (C.H. Beck, Hart, Nomos, Muenchen, Oxford, Baden-Baden 2008), 475-504, p. 488.

¹¹²⁰ Greenwood, *supra* note 1111, pp. 8-9; Faite and Grenier, *supra* note 1111, p. 11. Article 8(2)(a) and (b) grant jurisdiction over crimes committed in international armed conflict; Article 8(2)(c) and (e) grant jurisdiction over crimes committed in armed conflict not of an international character.

¹¹²¹ *Lubanga*, Confirmation of Charges, para. 209.

force.¹¹²² The opposite claim is that an armed conflict is only international if it involves hostilities between two states¹¹²³- and a UN force is not a state.¹¹²⁴

This issue was broached in the *RUF Case*. The Trial Chamber found the conflict in Sierra Leone to be non-international in nature, and examined whether the involvement of the ECOMOG¹¹²⁵ force automatically rendered the armed conflict international. Unfortunately the Trial Chamber did not discuss this in depth, but held that the armed conflict remained non-international, because “ECOMOG fought against the AFRC/RUF at the behest of the internationally recognised Kabbah Government”.¹¹²⁶ Henceforth the “intervention cannot be classed as recourse to armed force between two States”.¹¹²⁷ The Trial Chamber reached this conclusion by applying the definition of international armed conflict found in common Article 2 of the Geneva Conventions, that international armed conflict exists whenever there is declared war or any other armed conflict between two or more High Contracting Parties, which in the case of the Geneva Conventions, limits international armed conflict to armed conflict between states.¹¹²⁸ However, Additional Protocol I recognises that Article 2 of the Geneva Conventions also includes “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination”.¹¹²⁹

On strict application of the Geneva Conventions, the SCSL was correct in determining that the Sierra Leone conflict did not transform into an international one. However, there are two issues. Firstly, the

¹¹²² Faite and Grenier, *supra* note 1111, p. 11; P. Kirsch, 'The Convention on the Safety of United Nations and Associated Personnel' (1995) *International Peacekeeping* 102-106, p. 105.

¹¹²³ Dinstein, *supra* note 1114, pp. 26-27. McCoubrey and White state that “there is no reason to think that the involvement of a UN force in a situation of armed conflict will of itself render the conflict ‘international’ for the purposes of the application of the *jus in bello*”; McCoubrey and White, *supra* note 1113, p. 172.

¹¹²⁴ Greenwood, *supra* note 1111, p. 15. Greenwood argues that because of its status as a subject of international law, the UN is subject to IHL “insofar as it engages in activities of the kind regulated by IHL”; *ibid.*, p. 16.

¹¹²⁵ Economic Community of West African States Monitoring Group.

¹¹²⁶ *RUF Case*, para. 973.

¹¹²⁷ *Ibid.*

¹¹²⁸ *RUF Case*, para. 971; M. Sassoli and A.A. Bouvier, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, (International Committee of the Red Cross, Geneva 1999), p. 89. The ICTY Appeals Chamber has held it to be “indisputable that an armed conflict is international if it takes place between two or more States”; *Prosecutor v Tadic*, Appeal Judgement, IT-94-1-A (15 July 1999), para. 84.

¹¹²⁹ Article 1(4), Additional Protocol I.

ECOMOG force was not a UN force, but a force from West African States fighting under a mandate from ECOWAS.¹¹³⁰ While it may have been a multi-national force, it was ultimately a regional multi-national force, not a UN-mandated force. Hence there must be differentiation between the situations of the organisations involved and the mandates of the forces.¹¹³¹ This would include the application of IHL to the mission forces and the extent of such application by the forces.¹¹³²

Secondly, it is determined that IHL applies to UN forces when they are engaged in hostilities. While it is true that IHL has been determined to apply in both international and non-international armed conflicts, and there is support for the elimination of a distinction between the two,¹¹³³ a distinction does still exist between international and non-international armed conflict, particularly with regard to IHL. The application of IHL to UN forces demonstrates that there is consideration of the UN forces as engaging in international armed conflict.¹¹³⁴ Even if the UN forces are fighting at the request of a government, it cannot be said that they are engaging in non-international armed conflict because they do not form part of the government (or other) forces. UN forces are independent of all parties to any armed conflict; impartiality is one of the basic principles of peacekeeping.¹¹³⁵ Therefore, a UN force is an international force which may become party to the conflict upon engagement in hostilities- and therefore the armed conflict becomes international.

¹¹³⁰ Economic Community of West African States; *RUF Case*, para. 973.

¹¹³¹ The Statute of the SCSL expressly excludes peacekeeping personnel from the SCSL jurisdiction under Article 1(2) of its statute: “Any transgressions by peacekeepers and related personnel present in Sierra Leone pursuant to the Status of Mission Agreement in force between the United Nations and the Government of Sierra Leone or agreements between Sierra Leone and other Governments or regional organizations, or, in the absence of such agreement, provided that the peacekeeping operations were undertaken with the consent of the Government of Sierra Leone, shall be within the primary jurisdiction of the sending State.”

¹¹³² Zwanenburg points out “the discrepancy between the attention for respect for international humanitarian law by operations under United Nations command, and ‘subcontracted’ operations like ECOMOG”, with the UN applying minimum standards whereas ECOMOG did not; M. Zwanenburg, ‘Double Standards in Peacekeeping? Subcontracting Peacekeeping and International Humanitarian Law’ (1999) 12 *Leiden Journal of International Law* 753-757, p. 756.

¹¹³³ *Tadic*, Appeal on Jurisdiction, paras. 97-98; E. Crawford, ‘Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-international Armed Conflicts’ (2007) 20 *Leiden Journal of International Law* 441-465; Cassese, *International Criminal Law*, *supra* note 1045, p. 96.

¹¹³⁴ Greenwood, *supra* note 1111, p. 25.

¹¹³⁵ *United Nations Peacekeeping Operations Principles and Guidelines* (New York: Peacekeeping Best Practices Section, Division of Policy, Evaluation and Training, Department of Peacekeeping Operations, United Nations, January 2008), pp. 66-69, available at http://pbpu.unlb.org/pbpps/Library/Capstone_Doctrine_ENG.pdf (hereinafter ‘DPKO Principles and Guidelines’), pp. 33-34.

The ICTY has held that an internal armed conflict “may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State.”¹¹³⁶ It may be argued that a state has intervened in the conflict through its troops, despite the fact that those troops are part of the UN-mandated mission. The ICTY determined that a test of control must be applied to determine whether individuals are acting on behalf of a state, and thus whether that renders the conflict international. Reference was made to the *Nicaragua* test, which requires that the “State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed”.¹¹³⁷ The ICTY determined that the

“control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group.”¹¹³⁸

While both courts apply the concept of control, it seems that the ICTY has a lower threshold in determining this control, as the ICJ held that the US participation in financing, organising, training, supplying and equipping the contras, the selection of its military or paramilitary targets, and the planning of the whole operation was insufficient to attribute the acts of the contras to the US- that is, such participation did not amount to control.¹¹³⁹ In contrast, such US participation would fall within the ICTY test for control. The ICJ has since differentiated the determination of state control by the

¹¹³⁶ *Tadic*, Appeal Judgement, para. 84; see also *Lubanga* Confirmation of Charges, para. 209.

¹¹³⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, ICJ Reports 1986, p. 14, para. 115; *Tadic*, Appeal Judgement, para. 100. Additional Protocol II also refers to “responsible command” of armed forces or other organised armed groups; Article 1(1).

¹¹³⁸ This test is used when a state does not intervene directly; *Tadic*, Appeal Judgement, para. 137; *Lubanga* Confirmation of Charges, para. 210. Agency has also been discussed in *Prosecutor v Dragan Nikolić*, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, IT-94-2-PT (9 October 2002), with regard to whether SFOR is an agent of the ICTY. The Pre-Trial Chamber concluded that SFOR merely fulfilled its obligations to arrest and transfer, but could not determine whether or not a relationship of agency between the ICTY Office of the Prosecutor and SFOR existed; paras. 67-69. See also T. Henquet, 'Accountability for Arrests: The Relationship between the ICTY and NATO's NAC and SFOR', in Boas and Schabas (eds.), *International Criminal Law Developments in the Case Law of the ICTY*, (Brill, Leiden 2003), 113-155; J. Sloan, 'Prosecutor v Dragan Nikolic: Decision on Defence Motion on Illegal Capture' (2003) 16 *Leiden Journal of International Law* 541-552.

¹¹³⁹ *Nicaragua*, paras. 115-6.

ICTY from that of its own reasoning in *Nicaragua*.¹¹⁴⁰ The Court held that the ICTY reasoning was appropriate for ascertaining state control in the context of seeking to define an armed conflict as international or non-international in international criminal law, but not for state responsibility in public international law, and chose to follow the *Nicaragua* test.¹¹⁴¹

In a peace operation, such control is shared between the sending state and the UN.¹¹⁴² Effective control is exercised over military personnel by the sending state and by the UN. For example, the sending state controls any disciplinary matters, but the UN is ultimately in charge of the military actions of personnel on a mission.¹¹⁴³ Personnel have been financed, trained and equipped by their sending states, but are also financed, trained and equipped by the UN whilst on a mission.¹¹⁴⁴ National case law has also held that member states of the UN still retain their sovereignty when carrying out UN tasks and national personnel are still ultimately agents of the state, because the “individual component forces [of a mission] have their own national duty and discipline and remain in their national service”.¹¹⁴⁵ Therefore, given the fact that each sending state contributes significantly to “organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group”,¹¹⁴⁶ it could be argued that the armed conflict is international due to the involvement of each sending state through its troops, who remain agents of their sending state.

¹¹⁴⁰ *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Gen. List No. 91, 26 February 2007, paras 402-405.

¹¹⁴¹ *Ibid.* See also C.F. Amerasinghe, 'The Bosnia Genocide Case' (2008) 21 *Leiden Journal of International Law* 411-428, pp. 426-428.

¹¹⁴² See further discussion on control of PSOs *infra*, at Command and Superior Responsibility.

¹¹⁴³ Although this UN control may not be absolute in praxis, which may in turn support the argument that the state is in control of its personnel; see discussion *infra* at Command and Superior Responsibility. States will still apply their own Rules of Engagement (ROE) to their national personnel, and also apply a distinct interpretation of the mission ROE; McCoubrey and White, *supra* note 1113, p. 146; P. Rowe, *The Impact of Human Rights Law on Armed Forces*, (Cambridge University Press, Cambridge 2006), pp. 227-8; B.F. Klappe, 'International Peace Operations', in Fleck (ed.), *The Handbook of International Humanitarian Law*, 2nd ed., (Oxford University Press, Oxford 2008), 635-673, pp. 642-3; 655-662.

¹¹⁴⁴ The UN also accepts responsibility for injuries or damage caused by mission personnel unjustifiably to innocent parties, with the exclusion of damage to persons or property resulting solely from military operations or military necessity; Zwanenberg, *Accountability*, *supra* note 1032, pp. 88-89; R. Murphy, 'An Assessment of UN Efforts to Address Sexual Misconduct by Peacekeeping Personnel' (2006) 13 (4) *International Peacekeeping* 531-546, p. 539.

¹¹⁴⁵ House of Lords decision in *Attorney-General v Nissan* [1969] All ER 629, at 647.

¹¹⁴⁶ See further discussion on control of PSOs *infra*, at Command and Superior Responsibility.

The Preparatory Commission of the Rome Statute specifically decided not to define 'international armed conflict',¹¹⁴⁷ and thus it is open to interpretation by the Court. However, one inclusion has been added to the Elements of Crimes, in a footnote to Article 8(2)(a)(i), which states that 'international armed conflict' as it applies to all crimes under Article 8(2)(a) includes military occupation.¹¹⁴⁸ This may help to clarify which provisions to charge under in some circumstances, as some peacekeeping missions involve the UN acting as an occupying power.¹¹⁴⁹ In such a situation, under the Rome Statute armed conflict would automatically be classified as international.

These arguments demonstrate that the situation is far from clear. The Prosecutor would not necessarily have to make a distinction with charges, as he already avoided doing in the *Lubanga* case. It is for the Court to determine this on the facts at the pre-trial stage.¹¹⁵⁰ The charges confirmed against Lubanga are those of enlisting and conscripting children under both Article 8(2)(b)(xxvi) (international armed conflict) and Article 8(2)(e)(vii) (non-international armed conflict).¹¹⁵¹ Charging crimes under both international and non-international was based on the fact that the Trial Chamber found there to be both types of armed conflict in existence at different periods of time.¹¹⁵²

¹¹⁴⁷ Dörmann *et al.*, *supra* note 1105, p. 115.

¹¹⁴⁸ The law of occupation has been applied by states in some missions, and such application has support. *See e.g.* M.J. Kelly, *Restoring and Maintaining Order in Complex Peace Operations: The Search for a Legal Framework* (Martinus Nijhoff Publishers, The Hague 1999); M.J. Kelly, *et al.*, 'Legal aspects of Australia's involvement in the International Force for East Timor' (2001) (841) *International Review of the Red Cross* 101-139; S. Vité, 'L'applicabilité du droit international de l'occupation militaire aux activités des organisations internationales' (2004) 86 (853) *International Review of the Red Cross* 9-34. There are, however, others that do not subscribe to the concept of occupation with regards to multi-national operations; *see* Zwanenberg, *Accountability*, *supra* note 1032, pp. 198-9; B. Oswald, 'The Law on Military Occupation: Answering the Challenges of Detention During Contemporary Peace Operations?' (2007) 8 (2) *Melbourne Journal of International Law* 311-326.

¹¹⁴⁹ For example, UNMIK, the UN Interim Administration Mission in Kosovo, both a civil and military presence in Kosovo; S/RES/1244 (1999). Rowe, however, asserts that it is "unrealistic... to argue that the armed forces comprising the multinational force are in 'occupation' of the territory on which they are based"; Rowe, *The Impact of Human Rights Law*, *supra* note 1143, p. 230. Yet during occupation, "territory must be placed under the actual authority of the... army" and "the authority of the legitimate authority [must have] passed into the hands of the occupant", and this is in fact what has occurred in PSOs such as UNMIK; Regulations concerning the Laws and Customs of War on Land, Annex to the Hague Convention IV 1907, Articles 42 and 43. *See also* Rowe's discussion in Rowe, 'Maintaining Discipline', *supra* note 1113, pp. 54-56.

¹¹⁵⁰ Rowe, 'War Crimes', *supra* note 1093, fn. 102, pp. 220-1.

¹¹⁵¹ *Lubanga*, Confirmation of Charges, para. 410.

¹¹⁵² *Ibid.*, paras. 205- 237.

5.2.2.3. Knowledge of Existence of Armed Conflict and Status of Victim

Finally, under Article 8, a perpetrator of a war crime must be aware of the existence of an armed conflict. The knowledge required is simply that of the existence of an armed conflict, and the perpetrator is not required to have any knowledge of the category of armed conflict (international or non-international) or the circumstances establishing the category of armed conflict.¹¹⁵³ It would be extraordinarily difficult for a peacekeeper to claim they were not aware of the existence of an armed conflict within the territory in which they are stationed. As stated above, the ultimate reason for the presence of a PSO within any territory is a situation of armed conflict or post-conflict. Even if granted a mandate,¹¹⁵⁴ rules of engagement and weaponry consistent only with the ability to engage in hostilities in self-defence, this does not result in a lack of awareness of circumstances amounting to armed conflict in the territory in which the mission is carrying out the mandate.

For some war crimes,¹¹⁵⁵ the perpetrator must also be aware of the factual circumstances establishing the status (protected or civilian/non-combatant) of the victim.¹¹⁵⁶ The status of the victim is to be either protected under one or more of the Geneva Conventions of 1949 (Article 8(2)(a)) or is either *hors de combat* or a civilian, medical personnel or religious personnel taking no active part in the hostilities (Article 8(2)(c)). Protected persons are “those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the Conflict or Occupying Power of which they are not nationals”.¹¹⁵⁷ The elements of nationality and ‘in the hands of’ have been loosely applied by the ICTY, in order to avoid a too restrictive interpretation of the definition, particularly with regard to the number of non-international armed conflicts between parties of the same nationality. Thus a person may be granted

¹¹⁵³ Dörmann *et al.*, *supra* note 1105, p. 122; Bothe, *supra* note 1101, p. 389.

¹¹⁵⁴ Klappe, *supra* note 1143, pp. 648-655.

¹¹⁵⁵ Those under Articles 8(2)(a) and 8(2)(c).

¹¹⁵⁶ The perpetrator does not have to be aware “of the protected status under the Geneva Conventions *per se*, which would be a question of law”- the emphasis is on the factual circumstances; Dörmann *et al.*, *supra* note 1105, pp. 118-119; Bothe, *supra* note 1101, p. 390.

¹¹⁵⁷ Article 4, Geneva Convention IV.

protected status even if s/he is the same nationality as the perpetrator.¹¹⁵⁸ The Appeals Chamber decided that “Article 4 intends to look to the substance of relations, not their legal characterisation as such”.¹¹⁵⁹ With respect to ‘in the hands of’, the ICTY has referred to the ICRC’s Commentary on the Geneva Convention IV which expressly states that “It is not merely a question of being in enemy hands directly, as a prisoner is... In other words, the expression ‘in the hands of’ need not necessarily be understood in the physical sense; it simply means that the person is in territory under the control of the Power in question”.¹¹⁶⁰ Thus it is clear that the definition of a protected person is a broad one, and will cover a prisoner of war, but also any person located in the territory in which armed conflict is taking place and in general which is under the control of a party to the conflict.

Again, the situation in which the mission is conducted will provide clear evidence of a person’s non-combatant status. The relevant facts of each victim should be examined to ascertain whether, “in each individual’s circumstances, that person was actively involved in hostilities at the relevant time”.¹¹⁶¹ Encompassed within this definition would also be former members of an armed force who have laid down their arms and are no longer taking part in hostilities.¹¹⁶² A peacekeeper would have trouble proving that they were not aware of the protected status of a young girl, or a woman working in a brothel, located within the territory under control of one or more parties involved in the armed conflict. The victims of sexual exploitation by peacekeeping personnel are not taking direct part in hostilities and therefore are not combatants- they are part of the civilian population.¹¹⁶³

Overall, it can be seen that there are some challenges to the potential application of the chapeau elements of war crimes to crimes committed by peacekeeping personnel. The determination of the existence of an armed conflict and the status of such a conflict are the two biggest hurdles. Ultimately, however, it would not be impossible to prosecute a peacekeeper under Article 8 of the

¹¹⁵⁸ *Tadic*, Appeal Judgement, para. 166.

¹¹⁵⁹ *Ibid.*, para. 168.

¹¹⁶⁰ *Prosecutor v Rajic*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, ICTY-95-12-R61 (13 September 1996), para. 36.

¹¹⁶¹ *Tadic*, Trial Judgement, para. 616.

¹¹⁶² *Tadic*, Trial Judgement, para. 616; Zimmerman, *supra* note 1119, p. 488.

¹¹⁶³ *Tadic*, Trial Judgement, para. 615; N. Melzer, *Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law*, (International Committee of the Red Cross, Geneva 2009).

Rome Statute. Once the existence of an armed conflict has been established, applying the broad interpretation of association with armed conflict established by the ICTY in the *Foca* case¹¹⁶⁴ will enable the Prosecutor to argue that crimes committed by a peacekeeper are committed in the context of and are associated with an armed conflict, regardless of whether or not the peacekeeping personnel were engaged as combatants in that armed conflict.

5.3. Gender-based Crimes

5.3.1. Development in International Criminal Law

The past two decades have seen a significant advancement in international criminal law of the development of the law of crimes against women, particularly sexual offences. Crimes such as rape and sexual slavery have become a common weapon of war.¹¹⁶⁵ After so many years of impunity for perpetrators of these crimes, the late 20th Century brought about changes in the way the international community views such crimes, and it has become customary law that rape and sexual violence are prohibited in armed conflict.¹¹⁶⁶ Rape was prohibited for US armed forces under the Lieber Code of 1863.¹¹⁶⁷ In international humanitarian law,¹¹⁶⁸ Common Article 3 of the Geneva Conventions proscribes outrages upon personal dignity, in particular humiliating and degrading treatment, and Article 27 of the Fourth Geneva Convention states “Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault”.¹¹⁶⁹ The Additional Protocols specifically mention rape: “Women shall be

¹¹⁶⁴ See text accompanying note 1104.

¹¹⁶⁵ Security Council Resolution 1820 (2008) on Women, Peace and Security, S/RES/1820 (2008), 19 June 2008; *Akayesu*, Trial Judgement, paras. 416-460, 685-695.

¹¹⁶⁶ J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, (Cambridge University Press, Cambridge 2005), p. 323.

¹¹⁶⁷ Article 44, Instructions for the Government of Armies of the United States in the Field, prepared by Francis Lieber, LL.D., Originally Issued as General Orders No. 100, Adjutant General's Office, 1863, Washington 1898: Government Printing Office.

¹¹⁶⁸ See T. Meron, 'Rape as a Crime under International Humanitarian Law' (1993) 87 (3) *American Journal of International Law* 424-428.

¹¹⁶⁹ Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287, entered into force 21 October 1950.

the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.”¹¹⁷⁰

Neither of the International Military Tribunals (IMT) established after World War II included rape as an express crime in their Charters. However, a US military tribunal and the IMT of the Far East (Tokyo Tribunal) convicted Generals Toyoda¹¹⁷¹ and Matsui¹¹⁷² of command responsibility for violations of the laws or customs of war committed by their soldiers in Nanking. These violations included widespread rapes and sexual assaults. In *Yamashita*, the former general¹¹⁷³ was convicted of war crimes committed by troops under his command, which included rape.¹¹⁷⁴

Since the establishment of the two *ad hoc* tribunals, the prohibition of gender-based crimes against women, and jurisprudence on the crimes, particularly sexual violence, has developed exponentially. The crimes of sexual violence against women were of such a massive scale in Rwanda and the former Yugoslavia that they could not be ignored.¹¹⁷⁵ A number of cases in the *ad hoc* tribunals have become extremely prominent in discussion about sexual violence in international criminal law:¹¹⁷⁶

¹¹⁷⁰ API, Article 76(1) Protection of Women. APII, Article 4(2)(c) Fundamental guarantees prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form or indecent assault”.

¹¹⁷¹ *Soemu Toyoda*, United States, US Military Tribunal sitting in Tokyo, 6 September 1949, *Official Transcript of Record of Trial*, at 4998-5007.

¹¹⁷² *Iwane Matsui*, International Military Tribunal for the Far East, November 1948, pp. 453-4.

¹¹⁷³ Yamashita was formerly Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands.

¹¹⁷⁴ *In re Yamashita* (1945) 327 US 1.

¹¹⁷⁵ See A. Stiglmeier (ed.), *Mass Rape: The War against Women in Bosnia-Herzegovina*, (University of Nebraska Press, Lincoln and London 1994); K.D. Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals*, (Martinus Nijhoff Publishers, The Hague 1997). See also Letter dated 24 May 1994 from the Secretary-General to the President of the Security Council, A/1994/674 (1993), at 2, annex *Final Report of the Commission of Experts established pursuant to Security Council Resolution 780* (1992); see particularly Rape and Sexual Assault: A Legal Study, S/1994/674/Add.2 (Vol. I), Annex II.

¹¹⁷⁶ See e.g., Askin, *ibid.*; K.D. Askin, 'The International War Crimes Trial of Anto Furundzija: Major Progress Toward Ending the Cycle of Impunity for Rape Crimes' (1999) 12 *Leiden Journal of International Law* 935-955; R. Dixon, 'Rape as a Crime in International Humanitarian Law: Where to from Here?' (2002) 13 (3) *European Journal of International Law* 697-719; D. Buss, 'Prosecuting Mass Rape: Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic' (2002) 10 *Feminist Legal Studies* 91-99; P. Viseur Sellers, 'Sexual Violence and Peremptory Norms: The Legal Value of Rape' (2002) 34 *Case Western Reserve Journal of International Law* 287-303; K.D. Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles' (2003) 21 *Berkeley Journal of International Law* 288-316; A. Obote-Odora, 'Rape and Sexual Violence in International Law: ICTR Contribution' (2005) 12 *New England Journal of International and Comparative Law* 135-159; W. Schomburg and I. Peterson, 'Genuine Consent to Sexual Violence under International Criminal Law' (2007) 101 (1) *American Journal of International Law* 121-140.

*Akayesu, Celebici, Furundzija, Foca, Semanza, Gacumbitsi, AFRC Case and RUF Case.*¹¹⁷⁷ *Akayesu* was the first case in any of the *ad hoc* tribunals to address rape.¹¹⁷⁸ The ICTR Trial Chamber sought to create a definition of rape and sexual violence in international criminal law, which was previously non-existent:

“The Tribunal notes that while rape has been historically defined in national jurisdictions as non-consensual sexual intercourse, variations on the form of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual. ... The Tribunal considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts... Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity...

*“The Tribunal defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact... The Tribunal notes in this context that coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or... military presence... among refugee... women...”*¹¹⁷⁹

Both *Celebici* and *Furundzija* upheld the definition of rape as found in *Akayesu*. The *Celebici* Trial Chamber agreed that rape constitutes “a physical invasion of a sexual nature, committed on a person under circumstances that are coercive”,¹¹⁸⁰ and declared that “[t]here can be no doubt that rape and

¹¹⁷⁷ *Akayesu*, Trial Judgement; *Prosecutor v Delalic et al. (Celebici)*, Trial Judgement (16 November 1998), IT-96-21-T; *Prosecutor v Furundzija*, Trial Judgement, (10 December 1998), IT-95-17/1-T; *Prosecutor v Kunarac et al. (Foca)*, Trial Chamber Judgement, IT-96-23-T & IT-96-23/1-T (22 February 2001); *Prosecutor v Semanza*, Judgment and Sentence, ICTR-97-20-T; *Prosecutor v Gacumbitsi*, ICTR-2001-64-T, Trial Judgement (17 June 2004); *Prosecutor v. Brima, Kamara and Kanu (AFRC Case)*, SCSL-2004-16-PT, Trial Judgement (20 June 2007); *RUF Case*.

¹¹⁷⁸ See e.g. C.A. MacKinnon, 'Defining Rape Internationally: A Comment on *Akayesu*' (2006) 44 *Columbia Journal of Transnational Law* 940-958; the same essay is also found in C.A. MacKinnon, *Are Women Human? And Other International Dialogues*, (Belknap Press, Cambridge, Mass., London 2006), pp. 237-246.

¹¹⁷⁹ *Akayesu*, Trial Judgement, paras. 686-688 (emphasis added). The Trial Chamber found that forcing a young girl to do gymnastics naked in front of a crowd constitutes sexual violence; para. 688.

¹¹⁸⁰ *Celebici*, Trial Judgement, para. 479.

other forms of sexual assault are expressly prohibited under international humanitarian law”.¹¹⁸¹ However, the Trial Chamber in *Furundzija* engaged in a more in-depth discussion of the definition of rape, acknowledging the *Akayesu* judgement,¹¹⁸² but also considering domestic laws of States.¹¹⁸³ From this consideration, the Trial Chamber acknowledged that “most legal systems in the common and civil law worlds consider rape to be the forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either the vagina or the anus”.¹¹⁸⁴ However, the Trial Chamber found there to be a distinction in domestic law with regards to whether forced oral penetration was categorised as rape or as sexual assault. The Trial Chamber held “that the forced penetration of the mouth by the male sexual organ constitutes a most humiliating and degrading attack upon human dignity”, and thus “such an extremely serious sexual outrage as forced oral penetration should be classified as rape”.¹¹⁸⁵ The Trial Chamber went on to define rape as:

“(i) the sexual penetration, however slight:

(a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or

(b) of the mouth of the victim by the penis of the perpetrator;

(ii) by coercion or force or threat of force against the victim or a third person.”¹¹⁸⁶

This definition is more refined, more definitive than that created by the *Akayesu* Trial Chamber. It is also more restrictive, a factor which was recognised by the Trial Chamber in *Foca*,¹¹⁸⁷ which did substantially apply the definition, but ensured a broad interpretation of “coercion or force or threat of force against the victim or a third person”. The Trial Chamber stated that “coercion in particular would encompass most conduct which negates consent”.¹¹⁸⁸ A definition of the *actus reus* of rape was developed from the *Furundzija* one:

¹¹⁸¹ *Ibid.*, para. 476.

¹¹⁸² *Furundzija*, Trial Judgement, para. 176.

¹¹⁸³ *Ibid.*, paras. 178-182. *See also Foca*, Trial Judgement, paras. 439-456.

¹¹⁸⁴ *Furundzija*, Trial Judgement, para. 181.

¹¹⁸⁵ *Ibid.*, para. 183.

¹¹⁸⁶ *Ibid.*, para. 185.

¹¹⁸⁷ *Foca*, Trial Judgement, para. 438.

¹¹⁸⁸ *Ibid.*, para. 459.

“the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances.”¹¹⁸⁹

The *mens rea* of the crime was held to be “the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim”.¹¹⁹⁰ The notable difference between the *Furundzija* and *Foca* definitions is that any reference to force or threat of force, as found in *Furundzija*, has been removed in *Foca*, and the emphasis is on lack of consent of the victim. The *Foca* Trial Chamber held that there are factors other than force or threat of force “which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim”,¹¹⁹¹ such as general circumstances that would “have the effect that the victim’s will was overcome or that her ability freely to refuse the sexual acts was temporarily or more permanently negated”.¹¹⁹² In the facts of the case, lack of consent of victims was proven by factors such as their captivity (enslavement) and threats of violence and death.¹¹⁹³ However, it is notable that in these cases, there was a move away from the use of non-consent as a factor in rape, and a preference for coercion as a defining element. In using coercion, lack of consent is almost irrelevant, as non-consent is to be assumed by the coercive circumstances.¹¹⁹⁴ “circumstances prevailing in most cases charged under international criminal law, as either genocide, crimes against humanity, or war crimes, will be almost universally coercive, thus vitiating true consent”.¹¹⁹⁵

Other than rape, *Foca* also involved accusations of forced naked dancing, which were charged as outrages upon personal dignity.¹¹⁹⁶ Victims were forced to strip and to dance naked in front of the defendant Kovac and other men. The Trial Chamber held this to be a “painful and humiliating

¹¹⁸⁹ *Ibid.*, para. 460.

¹¹⁹⁰ *Ibid.*

¹¹⁹¹ *Ibid.*, paras. 438, 459.

¹¹⁹² *Ibid.*, para. 452.

¹¹⁹³ *Ibid.*, e.g., paras. 646-647; 739-741.

¹¹⁹⁴ E.g. *Akayesu*, Trial Judgement, paras. 686-688; MacKinnon, ‘Defining Rape’, *supra* note 1178, p. 951.

¹¹⁹⁵ *Prosecutor v Muhimana*, Judgement and Sentence, ICTR-95-1B-T (28 April 2005), para. 546.

¹¹⁹⁶ *Foca*, Trial Judgement, paras. 766-774; 782.

experience for the three women involved, even more so because of their young age”.¹¹⁹⁷ The defendants were also found guilty of enslavement, as many of the victims were enslaved in apartments by the defendants, in order to do household duties, but principally to provide sexual services for the defendants and other men.¹¹⁹⁸

In *Furundzija*, the Trial Chamber referred to sexual violence other than rape:

“international criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration. It would seem that the prohibition embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim’s dignity.”¹¹⁹⁹

The *Akayesu* Trial Chamber held that forcing a young woman to undress and do gymnastics naked in a public courtyard constituted sexual violence, which fell within the scope of other inhumane acts, outrages upon personal dignity, and serious bodily or mental harm as set forth in the ICTR Statute. The Tribunal defined sexual violence as “any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do involve penetration or even physical contact.”¹²⁰⁰

The SCSL has also addressed certain gender-based crimes- rape, sexual slavery and forced marriage. The SCSL’s development of the crime of forced marriage has been quite prominent. In the *AFRC Case*, the trial judgement held that forced marriage was not a separate crime against humanity, and that the elements constituted sexual slavery.¹²⁰¹ This decision was appealed by the Prosecutor and reversed by the Appeals Chamber, which established forced marriage as a separate crime against humanity, falling under the category of ‘other inhumane acts’- rather than ‘sexual violence’.¹²⁰² The reason for this categorisation was the finding that the crime is not necessarily sexual in nature, and

¹¹⁹⁷ *Ibid.*, para. 773.

¹¹⁹⁸ *Ibid.*, e.g. para. 782.

¹¹⁹⁹ *Furundzija*, Trial Judgement, para. 186.

¹²⁰⁰ *Akayesu*, Trial Judgement, para. 688.

¹²⁰¹ *Prosecutor v. Brima, Kamara and Kanu (AFRC Case)*, SCSL-2004-16-PT, Trial Judgement (20 June 2007), paras. 703-714.

¹²⁰² *Prosecutor v. Brima, Kamara and Kanu (AFRC Case)*, SCSL-2004-16-A, Appeal Judgement (22 Feb 2008), paras. 183-203. This has been upheld in *RUF Case*, Trial Judgement, paras. 164-166.

while non-consensual sex is usually an element of the crime it does not have to be. Forced marriage was found to consist of elements such as non-consensual sex, and deprivation of liberty. However, the Appeals Chamber established that the two distinct aspects of forced marriage are the compulsion of a person by force or threat of force into a forced conjugal association, and the subsequent relationship of exclusivity which includes disciplinary consequences for breaches of that exclusivity. Thus, forced marriage is not predominantly a sexual crime, but nonetheless remains a gender-based crime, as it is women who are abducted (under violent circumstances) to be wives for men. Forced marriage results in severe suffering, or physical, mental or psychological injury to the victim.¹²⁰³

Thus what has emerged from the *ad hoc* jurisprudence is a very broad definition of sexual violence. As with rape, coercion is a material element, but what constitutes the sexual violence itself is not subject to a limited definition, and will depend on the particular circumstances of a case. It includes forced nudity and forced naked activity (such as dancing or gymnastics), and other cases have also determined sexual mutilation, forced marriage, forced abortion, sexual molestation,¹²⁰⁴ and biting and kicking of the genital area, to constitute sexual violence.¹²⁰⁵ It has also been developed that gender-based crimes do not necessarily involve a sexual element, as with forced marriage, although sexual conduct is habitual.

5.3.2. The Rome Statute of the International Criminal Court

The Rome Statute was drafted in the 1990s, at a time following the start of the development of the *ad hoc* tribunal jurisprudence on gender-based crimes. Thus, the crimes included in the Rome Statute are influenced by some of this jurisprudence. However, the Elements of Crimes were not adopted until 2002,¹²⁰⁶ and therefore were able to draw on more significant jurisprudence, such as the *Furundzija* and *Foca* rulings. For example, the emphasis on lack of consent and coercive

¹²⁰³ *AFRC Case*, Appeal Judgement, para. 196.

¹²⁰⁴ *Prosecutor v Kvočka et al.*, Trial Judgement, IT-98-30/1-T (2 November 2001), para. 180 (fn. 343).

¹²⁰⁵ *Prosecutor v Todorovic*, Sentencing Judgement, IT-95-9/1-S (31 July 2001), paras. 38 and 66.

¹²⁰⁶ The Elements of Crimes were adopted under Article 9 of the Rome Statute, which provides for Elements of Crimes to assist the Court in interpretation and application of Articles 6, 7 and 8. Elements of Crimes, ICC-ASP/1/3 (part II-B), September 2002.

circumstances, rather than force, as developed in *Furundzija* and *Foca*, is echoed in the Elements of Crimes.¹²⁰⁷

Under Article 7(g) of the Rome Statute, crimes against humanity include “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity”.¹²⁰⁸ The definitions of these crimes found in Article 7(g) apply to the same crimes found under Article 8, as war crimes. Article 8(2)(b)(xxii) includes almost identical crimes as war crimes in international armed conflict: “Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions”. The text of Article 8(2)(e)(vi) (non-international armed conflict) is the same except the last phrase is “any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions”. Thus, there are six main categories of sexual offences¹²⁰⁹ under the Rome Statute: rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, and sexual violence.

To determine whether any of these could be applicable to the sexual exploitation and abuse misconduct committed by peacekeeping personnel as addressed in this thesis, the individual definitions of the four relevant crimes (rape, sexual slavery, enforced prostitution and sexual violence) must be examined. The definitions of the crimes are found in the Elements of Crimes.

5.3.2.1. Rape

The elements of rape under the Rome Statute are as follows:

¹²⁰⁷ See discussion below on elements of crimes for rape, enforced prostitution and sexual violence.

¹²⁰⁸ A definition is provided for forced pregnancy in Article 7(2)(f): ““Forced pregnancy” means the unlawful confinement, of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.”

¹²⁰⁹ The sexual offences were included in the Rome Statute after the intensive lobbying of the Women’s Caucus for Gender Justice in the ICC, a coordinated group of NGOs. They are sometimes referred to as the ‘gender crimes’, although, with the exception of forced pregnancy, the application of the sexual offences is gender-neutral. See M. Cottier, ‘Article 8 War crimes para. 2(b)(xxii)’, in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., (C.H. Beck, Hart, Nomos, Muenchen, Oxford, Baden-Baden 2008), , pp. 435-6. A footnote to the elements of rape notes that “[t]he concept of “invasion” is intended to be broad enough to be gender-neutral”.

“1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.

2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.”

It is apparent that this definition was designed to be broad, and to capture the essence of rape as a violation of sexual autonomy of the victim.¹²¹⁰ Avoidance of the word ‘penetrated’, instead preferring the term ‘invaded’, voices the experience of the victim, who feels invaded by the act of rape,¹²¹¹ and ensures the provision is gender-neutral.¹²¹² Reference to ‘any part of the body of the victim or of the perpetrator’ means that non-consensual oral sex or sexual intercourse qualifies as rape.¹²¹³ In addition, rape can be committed ‘with any object or any other part of the body’, and is not restricted to penetration by the penis. Application to peacekeeper conduct can be demonstrated using the example of allegations against Italian peacekeeping personnel, supported by photographic evidence, of the rape of a Somali woman with a flare gun.¹²¹⁴ This would clearly fall within the elements of rape, as her genital opening was physically invaded by an object. Likewise, the circumstances of the case of *Ronghi*, examined in Chapter 4, would also constitute rape, as he invaded the anal opening of his young victim with his sexual organ.¹²¹⁵

The second element of the crime of rape is quite detailed. While the direction taken by the ICTY in *Furundzija* and *Foca* has been followed to a certain extent, there is a distinct lack of express

¹²¹⁰ M. Boot and C.K. Hall, ‘Article 7 Crimes against humanity para. 1 (g)’, in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., (C.H. Beck, Hart, Nomos, Muenchen, Oxford, Baden-Baden 2008), 206-216, p. 210. The *Foca* Trial Chamber judgement recognised rape as a violation of sexual autonomy; *Foca*, Trial Judgement, para. 457.

¹²¹¹ Rape has typically been defined in domestic law around penetration; “defined according to what men think violates women”. However, “what women experience as degrading and defiling when we are raped includes as much that is distinctive to us as is our experience of sex”. MacKinnon, *Feminism Unmodified*, *supra* note 1047, p. 87.

¹²¹² E. La Haye, ‘Article 8(2)(b)(xxii)’, in Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, (Transnational Publishers, Inc., Ardsley, NY 2001), 187-198, p. 188.

¹²¹³ The terminology retains a gender-neutral phrasing, enabling male rape to be prosecuted under this provision.

¹²¹⁴ Lea Thompson, ‘Disturbing the Peace’, Dateline NBC, MSNBC (22 January 1999).

¹²¹⁵ *United States v Ronghi*, No. ARMY 20000635, (A. Ct. Crim. App. May 27, 2003); *United States v Ronghi*, 60 M.J. 83, 86 (C.A.A.F. 2004). *See supra*, Chapter 4.

reference to 'lack of consent'. The requirement of lack of consent may possibly be implied from the wording of the second element, as the Preparatory Commission did recognise that consent was an inherent element of the crime of rape.¹²¹⁶ However, the ultimate decision was not to phrase the second element in terms of consent,¹²¹⁷ and thus this leads to uncertainty as to whether the ICC can or should consider lack of consent as such as an element of the crime. Despite this, it must be remembered that the Elements of Crimes are not binding, but form guidance, and the Court is not precluded from taking a more expansive interpretation of what constitutes the crimes under the Rome Statute in its judgements.¹²¹⁸ From this perspective, it is open to the Court to regard 'lack of consent' as an element of rape. Cassese has interpreted 'coercion, or force, or threat of force' "in essence [to] imply or mean" 'lack of consent', and thus views the two definitions as "in substance equivalent".¹²¹⁹ It is true that, as has been shown in Chapter 4 and above, some case law has used the terms 'lack of consent' and 'coercion' in a manner which could be seen as interchangeable.¹²²⁰ However, to grant the same meaning to non-consent and coercion is inaccurate. In *Muhimana*, the ICTR clearly separated consent and coercion, viewing coercion as "an element that may obviate the relevance of consent as an evidentiary factor in the crime of rape".¹²²¹

As MacKinnon points out, there is a distinction between consent and coercion: "emphasis on nonconsent as definitive of rape views the crime fundamentally as a deprivation of sexual freedom, a denial of individual self-acting. Emphasis on coercion as definitive... sees rape fundamentally as a crime of inequality, whether of physical or other force, status or relation."¹²²² This differentiation also exists in the application in a court:

"Consent definitions accordingly have proof of rape turn on victim and perpetrator mental state: who wanted what, who knew what when... Coercion definitions by distinction turn on proof of

¹²¹⁶ Cottier, *supra* note 1209, p. 440.

¹²¹⁷ La Haye, *supra* note 1212, p. 189.

¹²¹⁸ Article 9(1) of the Rome Statute: "Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8". Elements of Crimes General Introduction "1. Pursuant to article 9, the following Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8..."

¹²¹⁹ Cassese, *International Criminal Law*, *supra* note 1045, p. 112, fn. 33.

¹²²⁰ See Chapter 3 Consent; *supra* text accompanying fn. 1180 and 1189.

¹²²¹ *Muhimana*, Judgement and Sentence, para. 546.

¹²²² McKinnon, 'Defining Rape', *supra* note 1178, p. 941.

physical acts, surrounding context, or exploitation of relative position: who did what to whom and sometimes why...Accordingly, while consent definitions tend to frame the same events as individuals engaged in atomistic one-at-a-time interactions, coercion definitions are the more expressly social, contextual, and collective in the sense of being group-based.”¹²²³

As the second element stands, the sexual invasion must be committed by force, threat of force, coercion, or by taking advantage of a coercive environment. This is clearly taken from the case law of the *ad hoc* tribunals, which, as discussed above, moved in the direction of coercion rather than non-consent, and the idea that non-consent is essentially irrelevant in such coercive circumstances.¹²²⁴ The ICC is likely to follow the direction of the *ad hoc* tribunals, in which the Chambers are “free to infer non-consent from the background circumstances”.¹²²⁵ However the *ad hoc* tribunals recognised that “inquiring into individual consent to sex for acts that took place in a clear context of mass sexual coercion” makes no sense.¹²²⁶ They also deemed certain circumstances to be inherently coercive—such as enslavement, armed conflict or a military presence.¹²²⁷ “The term ‘coercive environment’ can be understood as referring to, *inter alia*, vertical power relations between troops conquering a village and the inhabitants of that village or between a detained person and his or her guards.”¹²²⁸ This can specifically be applied to rape when committed by peacekeeping personnel. As previously discussed, PSOs take place either in the context of armed conflict, or in a post-conflict society. In addition to those circumstances, the power differential between peacekeeping personnel and the local community can create a situation of coercion, where a woman may feel intimidated and powerless to refuse the sexual advances of a peacekeeper. This may be defined as coercion, or as taking advantage of a coercive environment. The coercive environment would be constituted from the existence of armed conflict,¹²²⁹ or of the instability and insecurity of a post-conflict society including

¹²²³ *Ibid.*

¹²²⁴ *Supra* note 1194 and accompanying text.

¹²²⁵ *Gacumbitsi*, Trial Judgement, para. 155.

¹²²⁶ MacKinnon, ‘Defining Rape’, *supra* note 1178, p. 950.

¹²²⁷ *Akayesu*, Trial Judgement, para. 688; *Foca*, *e.g.*, paras. 452; 646-647; 739-741.

¹²²⁸ Cottier, *supra* note 1209, pp. 440-1.

¹²²⁹ The Special Rapporteur for Slavery has determined that “the manifestly coercive circumstances that exist in all armed conflict situations establish a presumption of non-consent and negates the need for the prosecution to establish a lack of consent as an element of the crime”; Final Report of the Special Rapporteur of the Working Group on Contemporary Forms of Slavery, on systematic rape, sexual slavery and slavery-like practices during

the lack of access to adequate financial and living resources, as well as lack of structured and effective rule of law. Such circumstances result in trauma, poverty and displacement of the local population- in turn creating a situation of desperation.¹²³⁰ This does not generate circumstances under which a woman has the true freedom of consent. The presumption of coercion also exists with regard to crimes against humanity. The ICTY has held that “circumstances... charged as... crimes against humanity will be almost universally coercive. That is to say, true consent will not be possible.”¹²³¹

If we take the example of the case of *Ronghi*,¹²³² involving a rape which was committed in post-conflict Kosovo, the elements of force (the violence used in subduing his victim) and taking advantage of a coercive environment (exploiting the trust his victim had in him by luring her to an empty basement) exist. It may be noted that there is no specific differentiation within the Rome Statute crimes with regards to the age of the victim. However, this is a factor likely to be considered as aggravating in sentencing decisions by the Court. It is also likely to be considered in relation to consent, as the Elements note that “[i]t is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity”.¹²³³ It may be inferred from this that lack of consent will be presumed in the case of rape of a child. Thus in *Ronghi*’s case there would be a presumption of lack of consent due to the young age of his victim (10 years old).

5.3.2.2. Sexual Slavery

Under the Rome Statute, the elements of sexual slavery are:

“1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.

armed conflict E/CN.4/Sub.2/1998/13, 22 June 1998, (hereinafter ‘Special Rapporteur for Slavery Report 1998’), para. 25.

¹²³⁰ P. Higate and M. Henry, 'Engendering (In)security in Peace Support Operations' (2004) 35 (4) *Security Dialogue* 481-498, p. 488.

¹²³¹ *Foca*, Appeal Judgement, para. 130.

¹²³² *United States v Ronghi*, *supra* note 1215.

¹²³³ Footnote 16 to Elements of Article 7(1)(g)-1.

2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.”

A footnote to element 1 notes that the deprivation of liberty may “include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956.”¹²³⁴ It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.”¹²³⁵

The elements of sexual slavery differ from rape in that they do not require force, threat of force, or coercive circumstances. The elements are different as the concept of slavery itself is the basis for the crime, with the additional element being the involvement of sexual acts. The emphasis is on the concepts of ownership or deprivation of liberty. It includes “situations where women and girls are forced into ‘marriage’, domestic servitude or other forced labour that ultimately involves forced sexual activity, including rape by their captors”.¹²³⁶ It is clear that the activities of some peacekeeping personnel would amount to sexual slavery; such as the purchase of a Moldovan woman by an American in Bosnia, who kept the woman in a house with her passport confiscated and forced her to

¹²³⁴ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 226 UNTS 3, entered into force 30 April 1957. Article 7(b) states that “‘A person of servile status’ means a person in the condition or status resulting from any of the institutions or practices mentioned in article I of this Convention”, which in turn covers “(a) Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined;

(b) Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status;

(c) Any institution or practice whereby:

(i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or

(ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or

(iii) A woman on the death of her husband is liable to be inherited by another person;

(d) Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.”

¹²³⁵ Footnotes 53 and 65, Elements of Crimes.

¹²³⁶ Boot and Hall, *supra* note 1210, p. 211; Special Rapporteur for Slavery Report 1998, *supra* note 1229, para. 8.

engage in sexual acts.¹²³⁷ Trafficking in women would also fall within the ambit of sexual slavery, as provided in the elements of crimes footnote, covering conduct such as transportation of women or facilitating the trafficking through procurement of false documents. Such conduct amounts to powers attaching to the right of ownership over a person, as well as a deprivation of liberty.

Peacekeeping personnel who engage in sexual relations with women being kept in sexual servitude could be charged with aiding, abetting or otherwise assisting sexual slavery. While they may not be the persons directly responsible for the victims' servitude, by their engagement with the victims are contributing to the ongoing servitude of such women. An aider and abettor does not have to be part of a plan or agreement,¹²³⁸ or be aware of the precise crime that was intended,¹²³⁹ but is criminally responsible if he "carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime... and this support has a substantial effect upon the perpetration of the crime".¹²⁴⁰ The engagement in sexual relations with women kept in sexual slavery has a substantial effect on the perpetration of the crime by enabling it to be carried out and to continue.

However, they could also be charged as principal perpetrators, as they are purchasing the women. The purchase may only be for a limited time, but for that period of time, they are exercising the powers of ownership by controlling that person's liberty (including sexual liberty) for the duration of the engagement.

5.3.2.3. Enforced Prostitution

The Elements of Crimes define enforced prostitution:

"1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress,

¹²³⁷ M. Vandenberg, 'Hopes Betrayed: Trafficking of Women and Girls to Post-Conflict Bosnia and Herzegovina for Forced Prostitution' (Human Rights Watch, New York, November 2002) Vol. 14, No. 9 (D) pp. 17; 62-67.

¹²³⁸ *Tadic*, Appeal Judgement, para. 229.

¹²³⁹ *Furundzija*, Trial Judgement, para. 246.

¹²⁴⁰ *Tadic*, Appeal Judgement, para. 229. See R. Cryer, 'General Principles of Liability in International Criminal Law', in McGoldrick, et al. (eds.), *The Permanent International Criminal Court*, (Hart Publishing, Oxford and Portland Oregon 2004), 233-262, p. 248.

detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.

2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.”

This offence could be used to prosecute peacekeeping personnel who engage in agreements with owners of brothels containing forced prostitutes, to provide protection against potential raids by the mission, or who have any kind of involvement with those engaged directly in forced prostitution.¹²⁴¹

As has been discussed in Chapter 2, many women working in ‘night clubs’ or brothels are trafficked or forced to work there as prostitutes. It has also been mentioned that, even in situations where women are working by choice, it is not a true ‘choice’, but rather one emanating from desperate circumstances¹²⁴² - which amounts to the night club or brothel owners taking advantage of a coercive environment.

Should a peacekeeper engage in pandering, they could be charged under this provision. This may be a charged in conjunction with sexual slavery. For example, the peacekeeping personnel in the Former Yugoslavia who bought women and kept them for their own sexual services would be charged with sexual slavery, but if they also offered the services of the woman or women to others, this could also amount to forced prostitution.¹²⁴³ Any forced prostitution taking place under the conditions of purchasing, selling, lending, bartering or deprivation of liberty would also amount to sexual slavery.

As with sexual slavery, it is possible that a peacekeeper who engages in patronising a forced prostitute could be charged with aiding, abetting or otherwise assisting in the commission of forced prostitution, or as the main perpetrators. Without clientele to purchase the service of the forced prostitutes, those who engage in forced prostitution would have no temptation or indeed means to

¹²⁴¹ See e.g. 'Kosovo (Serbia and Montenegro) "So does it mean that we have the rights?" Protecting the human rights of women and girls trafficked for forced prostitution in Kosovo' (Amnesty International, 6 May 2004) EUR 70/010/2004, p. 42. UNMIK Police were alleged to have assisted a brothel owner in trafficking women and to alert the brothel owner about a raid.

¹²⁴² See discussion in Chapter 2.

¹²⁴³ Amnesty International discovered allegations of Russian troops in Kosovo bringing trafficked women for sex work onto the KFOR base; 'So does it mean we have the rights?', *supra* note 1241, pp. 44-45.

commit the crime, as it is the demand that makes the crime possible.¹²⁴⁴ Thus any client is having a substantial effect upon the perpetration of the crime, and is aiding, abetting or otherwise assisting in the commission of the crime.¹²⁴⁵ However, it would be more significant to charge a peacekeeper as a main perpetrator. Under the provision, a peacekeeper engaging in acts of a sexual nature with a prostitute is taking advantage of a coercive environment, and another person obtains or expects to obtain pecuniary or other advantage in exchange for or in connection with these acts. That other person in receipt of pecuniary or other advantage (e.g. food) may be the victim herself, or may also be a brothel owner or panderer.¹²⁴⁶

5.3.2.4. Sexual Violence

Sexual violence consists of the following elements under the Rome Statute:

- “1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent.
2. Such conduct was of a gravity comparable to the other offences in article 7, paragraph 1 (g), of the Statute/ The conduct was of a gravity comparable to that of a grave breach of the Geneva Conventions/ The conduct was of a gravity comparable to that of a serious violation of article 3 common to the four Geneva Conventions.”

With the crime of sexual violence, once again there is the element of taking advantage of a coercive environment. Of all the provisions of the Rome Statute, sexual violence is the offence under which a charge for sexual exploitation would most likely succeed. It is clear that rape, sexual slavery and enforced prostitution are all crimes with very specific elements. However, the crime of sexual violence is a broadly defined one, in order to encompass a wide range of crimes.¹²⁴⁷ It has been discussed above how a coercive environment is created and can be presumed within an armed

¹²⁴⁴ “International presence generates sex trade” in ‘So does it mean we have the rights?’, *supra* note 1241, pp. 6-7; Murphy, ‘An Assessment of UN Efforts’, *supra* note 1144, p. 541.

¹²⁴⁵ *Tadic*, Appeal Judgement, para. 229.

¹²⁴⁶ La Haye, *supra* note 1212, p. 193.

¹²⁴⁷ *Ibid.*, p. 198.

conflict or in post-conflict society. Such an environment would then be the basis for determining that sexual exploitation falls within the ambit of 'sexual violence' under the Rome Statute, as the act of a sexual nature may not have been committed with force, but was certainly committed by taking advantage of a coercive environment.

Depending upon which provision the offence is being charged under, it must also, however, be determined whether the conduct was of gravity comparable to other crimes against humanity, to a grave breach of the Geneva Conventions, or to that of a serious violation of Common Article 3. Thus it must be proven that sexual exploitation is of gravity comparable to one of these definitions. This could be argued using the analysis as detailed in Chapter 2 of this thesis. The gravity of sexual exploitation is found in the fact that it violates many human rights of the women involved,¹²⁴⁸ as well as abusing a relationship that has a significant power differential. The crux of sexual exploitation is the abuse of "a position of vulnerability, differential power, or trust, for sexual purposes",¹²⁴⁹ and this makes it a grave crime. An additional factor of the gravity of the crime would be the age of the victim. Many cases involve girls,¹²⁵⁰ and the youth of a victim has been found by the *ad hoc* tribunals to be a factor that increases the pain and humiliation of sexual violence.¹²⁵¹

5.3.2.5. A New Provision?

While it may be argued that sexual exploitation would fall under the ambit of 'sexual violence', it may also be argued that the Rome Statute is lacking in an express provision which would enable peacekeeping personnel to be prosecuted for sexual exploitation, including patronising prostitutes. In the context of armed conflict, sexual exploitation should be acknowledged as a crime as grave as the other listed sexual offences. While the drafters of the sexual offences provision aimed to avoid

¹²⁴⁸ War crimes are also violations of human rights; Rowe, 'War Crimes', *supra* note 1093, pp. 212-213.

¹²⁴⁹ Secretary-General's Bulletin on Special measures for protection from sexual exploitation and sexual abuse, ST/SGB/2003/13 (2003) (Secretary-General's SEA Bulletin, 2003).

¹²⁵⁰ Investigation by the Office of Internal Oversight Services into allegations of sexual exploitation and abuse in the United Nations Organization Mission in the Democratic Republic of the Congo (2005), A/59/661.

¹²⁵¹ *Foca*, Trial Judgement, para. 773. In addition, the vulnerability and defenceless of the female victims was considered an aggravating factor in sentencing; para. 874.

less grave crimes such as sexual harassment,¹²⁵² sexual exploitation is a grave crime within itself, as demonstrated by the impact it has on victims by violating their rights and abusing their trust. It can also become something which is endemic;¹²⁵³ and can be linked to trafficking and forced prostitution. Sexual exploitation should be recognised as a crime in its own right, as it is a serious abuse of a sexual nature inflicted upon the physical and moral integrity of a person¹²⁵⁴ by taking advantage of a coercive environment. The elements of the crime of sexual exploitation could be taken from the UN definition: “[T]he term ‘sexual exploitation’ means any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another.”¹²⁵⁵ The element of force, threat of force, coercion or taking advantage of a coercive environment, or the person’s incapacity to give genuine consent, could be included; although this should not be necessary given the crucial aspect of sexual exploitation being the abuse of position, rather than an emphasis on force or lack of consent *per se*. Thus, the elements of the crime of sexual exploitation could be defined as follows:

1. Any actual or attempted abuse of a position of vulnerability, differential power, or trust, or taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent, for sexual purposes.
2. Such conduct was engaged in for the purpose of, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another.

Element two aims not to restrict the definition of sexual exploitation only to profiting monetarily, socially or politically from the sexual exploitation of another, but rather to include those circumstances as possible situations of sexual exploitation in addition to the basic element of the crime, as defined in the first element.

¹²⁵² Cottier, *supra* note 1209, p. 454.

¹²⁵³ Which is evidenced by the ongoing and widespread problem of use of prostitutes and sexual exploitation by peacekeepers in mission territories in worldwide locations; *supra* Chapters 2 and 3.

¹²⁵⁴ *Furundzija*, Trial Judgement, para. 186.

¹²⁵⁵ Secretary-General’s SEA Bulletin 2003.

Thus, it can be seen that the Rome Statute covers some of the relevant crimes, particularly rape, trafficking-related offences, sexual slavery and enforced prostitution, but does not necessarily contain express provisions to prosecute peacekeeping personnel for sexual exploitation. The crime of 'sexual violence' may be seen as adequate and applicable, but sexual exploitation is a crime of sufficient gravity to be introduced as a stand-alone, express sexual offence.

5.4. Command and Superior Responsibility

Under the Rome Statute, there are various categories of individual criminal responsibility through which the ICC could enact jurisdiction over peacekeeping personnel. The main categories, such as individual commission, joint commission, ordering and aiding, are found in Article 25.¹²⁵⁶ These categories have been referred to *supra* in the discussion on individual elements of crimes. However, another category of criminal responsibility which could have broad application to any of the crimes is that of responsibility of commanders and other superiors, found in Article 28.¹²⁵⁷ Indicting under

¹²⁵⁶ Note that ordering is technically a method of command or superior responsibility, as an order is given by a commander or superior. However, the criminal responsibility of ordering a crime falls under Article 25 not Article 28. The requirements for ordering a crime are quite distinct from those under command/superior responsibility, and will not be discussed in this thesis, as it is deemed unlikely that a commander or superior in a PSO would actually order a subordinate to commit rape or sexual exploitation. *See e.g.* C. Garraway, 'Superior orders and the International Criminal Court: Justice delivered or justice denied' (1999) 836 *International Review of the Red Cross* 785-794; P. Gaeta, 'The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law' (1999) 10 *European Journal of International Law* 172-191; L.C. Green, 'Superior Orders and Command Responsibility' (2003) 175 *Military Law Review* 309-384.

¹²⁵⁷ Article 28: "In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

Article 28 responsibility would expand the jurisdiction of the ICC over a greater number of personnel. This is particularly relevant with regard to PSOs, and even more so the military community. The Introduction to this thesis presented the military as a special community, part of which is the high level of discipline enforced, by a unique system of discipline and a hierarchical structure. Chapter 4 showed the specific types of crimes found only within the military, the so-called service-related offences, centred on such conduct as following orders. These crimes emphasise the important role of the hierarchy in the military; more specifically the role of commanders and superiors. A PSO is likewise hierarchical, with both military commanders and civilian superiors. The importance placed on superior responsibility by the UN has been discussed in Chapter 3, and the adoption of rules and regulations relating to the role of superiors has repercussions for liability, as will be demonstrated in this section.

In this section, 'command responsibility' will be used to refer to responsibility of military commanders, and 'superior responsibility' will refer to responsibility of civilian superiors. This section will briefly outline the development of command/superior responsibility in international criminal law, before summarising the elements of command and superior responsibility under the Rome Statute. The application of Article 28 to PSOs will then be discussed.

5.4.1. Development of Command/Superior Responsibility in International Criminal Law

"The criminal responsibility of commanders for war crimes committed by their subordinates, based on the commanders' failure to take measures to prevent or punish the commission of such crimes is

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."

Command "is the authority lawfully exercised by a commander over his or her subordinates by virtue of the rank or appointment held. Command provides the authority and responsibility for effectively planning and executing the employment of assigned resources to accomplish the mission." Control "is the process through which the commander, assisted by staff, organises, directs and co-ordinates the activities of the assigned forces." R. Murphy, 'Legal Framework of UN Forces and Issues of Command and Control of Canadian and Irish Forces' (1999) 4 *Journal of Armed Conflict Law* 41-73, p. 48.

a long-standing rule of customary international law.”¹²⁵⁸ Since World War II there has been case law in international criminal law dealing with command/superior responsibility, which has developed several elements of the doctrine.

Command/superior responsibility requires that there is a superior-subordinate relationship. This relationship can be in a military hierarchy or the superior can be a civilian. The status of the relationship is determined by whether the commander/superior had *effective control* over the subordinate: “actual possession, or non-possession, of powers of control over the actions of subordinates”.¹²⁵⁹ In *Blaskic*, the ICTY Trial Chamber held that “where a person has the material ability to prevent or punish crimes committed by others, that person must be considered a superior”.¹²⁶⁰ The commander/subordinate relationship does not have to be *de jure* authority, but can be *de facto*, which is “sufficient to occasion liability of the commander” (or superior).¹²⁶¹ What it is important is the “actual possession of control over the actions of subordinates, in the sense of material ability to prevent and punish the commission of crimes, as the crucial criterion”.¹²⁶² Thus “it is a commander’s degree of effective control, his material ability, which will guide the [Court] in determining whether he reasonably took the measures required either to prevent the crime or to punish the perpetrator”.¹²⁶³ The ICC has noted that other factors may be taken into account, including official position; the power to issue or give orders; the capacity to ensure compliance with the orders; the commander’s military position and associated tasks; the capacity to order forces or units to participate in hostilities; the capacity to change command structure; the power to promote,

¹²⁵⁸ Henckaerts and Doswald-Beck J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, (Cambridge University Press, Cambridge 2005), *supra* note 1166, p. 559.

¹²⁵⁹ *Prosecutor v Delalic et al. (Celebici)*, Appeal Chamber Judgement, IT-96-21-A (20 February 2001), para. 198; *Prosecutor v Aleksovski*, Trial Chamber Judgement, IT-94-14/1-T (25 June 1999), para. 76; *Blaskic*, Trial Judgement, paras. 301-335; *Prosecutor v Krstic*, Trial Chamber Judgement, IT-98-33 (2 August 2001), para. 648.

¹²⁶⁰ *Blaskic*, para. 335; *Prosecutor v Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, (*Bemba* Confirmation of Charges) ICC-01/05-01/08-424 (15 June 2009), para. 415-416.

¹²⁶¹ Henckaerts and Doswald-Beck, *supra* note 1166 p. 561. *Prosecutor v Delalic et al. (Celebici)*, Appeal Chamber Judgement, IT-96-21-A (20 February 2001), para. 251; *Blaskic*, Trial Judgement, para. 300.

¹²⁶² *Celebici*, Appeal Judgement, para. 256. *See also* Henckaerts and Doswald-Beck, *supra* note 1166, p. 561.

¹²⁶³ *Blaskic*, Trial Judgement, para. 335. *See also* *Aleksovski*, Trial Judgement, paras. 73-78.

replace, remove or discipline any force members; and the authority to allocate and withdraw forces.¹²⁶⁴

With regard to civilian superiors, this has been defined by the ICTY in *Celebici* as having “the possession of effective control over subordinates, which requires the possession of material abilities to prevent subordinate offences or to punish subordinate offenders”.¹²⁶⁵ In the ICTR case of *Musema*, the Trial Chamber established that Musema exercised *de jure* authority over employees of the Tea Factory at which he was a superior.¹²⁶⁶ This authority was exercised while they were on the premises of the Tea Factory and while engaged in their professional duties as employees, “even if those duties were performed outside factory premises”.¹²⁶⁷ Musema was found to have legal and financial control over employees, as he had the power to appoint and remove employees. In particular, the Chamber noted

“that Musema was in a position, by virtue of these powers, to take reasonable measures, such as removing, or threatening to remove, an individual from his or her position at the Tea Factory if he or she was identified as a perpetrator of crimes punishable under the Statute. The Chamber also finds that, by virtue of these powers, Musema was in a position to take reasonable measures to attempt to prevent or to punish the use of Tea Factory vehicles, uniforms or other Tea Factory property in the commission of such crimes. The Chamber finds that Musema exercised *de jure* power and *de facto* control over Tea Factory employees and the resources of the Tea Factory.”¹²⁶⁸

The case of *Yamashita* has been widely criticised for its imposition of a very high threshold of command responsibility.¹²⁶⁹ Yamashita was convicted of command responsibility despite being located nowhere near the troops and without attribution of knowledge of the crimes being

¹²⁶⁴ *Bemba* Confirmation of Charges, para. 417.

¹²⁶⁵ *Celebici*, Appeal Judgement, para. 266.

¹²⁶⁶ *Musema*, Trial Judgement, para. 880.

¹²⁶⁷ *Ibid.*

¹²⁶⁸ *Ibid.*

¹²⁶⁹ See e.g. Justice Murphy’s dissent; *In re Yamashita* (1945) 327 US 1. See also G.R. Vetter, 'Command Responsibility of Non-Military Superiors in the International Criminal Court' (2000) 25 *Yale Journal of International Law* 89-143, pp. 106-108; K. Ambos, 'Superior Responsibility', in Cassese, et al. (eds.), *The Rome Statute of the International Criminal Court*, Vol. I, (Oxford University Press, Oxford 2002), 823-872, pp. 825-828.

committed.¹²⁷⁰ However, the doctrine developed somewhat in subsequent cases. A significant distinction of command/superior responsibility from other forms of criminal responsibility is that it is responsibility by omission. The commander or superior is held liable for a failure to discharge their duty or obligation (to prevent or punish crimes by subordinates), rather than an act they have carried out.¹²⁷¹ This is opposed to responsibility being accorded directly for the actions of subordinates through strict liability. Strict liability removes the element of *mens rea*, which would result in a commander/superior being held liable for an offence committed by a subordinate even though the commander/superior did not have the requisite *mens rea* to commit the offence (e.g. intent, knowledge, etc).¹²⁷² In the *High Command Case*, the concept of strict liability was rejected.¹²⁷³ It has also been rejected in cases before the *ad hoc* tribunals.¹²⁷⁴ A commander is not held responsible by mere fact of position alone; rather, there must be some kind of intent involved, and if not malicious intent, at least negligence.¹²⁷⁵

Case law has set the standard for knowledge required by a commander/superior. A commander/superior is held responsible if they *knew or had reason to know* that crimes were going to be, were being committed, or had been committed by their subordinate. The ICTY held that the knowledge could be actual knowledge, demonstrated by direct or circumstantial evidence, or constructive knowledge, which puts the commander/superior on notice that further investigation is necessary.¹²⁷⁶ Cases have held that it is the duty of a commander to know about activities occurring within the scope of his/her power, although it has been recognised that a supreme commander could

¹²⁷⁰ *Ibid.*

¹²⁷¹ Cassese, *International Criminal Law*, *supra* note 1045, p. 242.

¹²⁷² Vetter, *supra* note 1269, p. 106.

¹²⁷³ *US v Wilhelm von Leeb et al. (High Command Case)*, UN War Crimes Commission, 12 Law Reports of Trials of War Criminals 23 (1948).

¹²⁷⁴ *Akayesu*, Trial Judgement, paras. 488-9.

¹²⁷⁵ *High Command case*; *Akayesu*, Trial Judgement, para. 489.

¹²⁷⁶ *Celebici*, Trial Judgement, paras. 141-146; 383; 393.

not possibly aware of every detail of a military operation.¹²⁷⁷ The ICTY has clarified that a commander is liable if:

“(1) he had actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing or about to commit crimes... or (2) where he had in his possession information of a nature, which at the least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates.”¹²⁷⁸

The Trial Chamber went on to state that “in the absence of direct evidence of the superior’s knowledge of the offences committed by his subordinates, such knowledge cannot be presumed, but must be established by way of circumstantial evidence”.¹²⁷⁹ In order to determine such knowledge, the ICTY suggested the following factors to take into consideration:

- “(a) The number of illegal acts;
- (b) The type of illegal acts;
- (c) The scope of illegal acts;
- (d) The time during which the illegal acts occurred;
- (e) The number and type of troops involved;
- (f) The logistics involved, if any;
- (g) The geographical location of the acts;
- (h) The widespread occurrence of the acts;
- (i) The tactical tempo of operations;
- (j) The modus operandi of similar illegal acts;
- (k) The officers and staff involved;
- (l) The location of the commander at the time.”¹²⁸⁰

In addition to knowledge, the commander/superior must have taken *necessary and reasonable measures to prevent* a crime or to *punish* the perpetrator of the crime. These measures must be

¹²⁷⁷ O. Triffterer and R. Arnold, 'Article 28 Responsibility of commanders and other superiors', in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., (C.H. Beck, Hart, Nomos, Muenchen, Oxford, Baden-Baden 2008), p. 828.

¹²⁷⁸ *Celebici*, Trial Judgement, para. 383.

¹²⁷⁹ *Ibid.*, para. 386.

¹²⁸⁰ *Ibid.* See also G. Mettraux, *The Law of Command Responsibility*, (Oxford University Press, Oxford 2009), pp. 214-5.

within the competence of the commander/superior.¹²⁸¹ The commander/superior will not be held responsible if they did not have “the material ability to prevent and punish the commission of the offences”.¹²⁸² It is the failure to carry out these necessary and reasonable measures “within his material possibility”¹²⁸³ that render the commander/superior criminally responsible- it is, essentially, a dereliction of duty to not prevent or punish the crime.¹²⁸⁴ However, the ICTY has recognised the difficulty in imposing a standard on what is necessary and reasonable: “any evaluation of the action taken by a superior to determine whether this duty has been met is so inextricably linked to the facts of each particular situation that any attempt to formulate a general standard *in abstracto* would not be meaningful”.¹²⁸⁵ Hence, what measures are necessary and reasonable is to be determined based on the individual circumstances of the case. The ICTY has held that the commander does not necessarily have to personally mete out the punishment; that “under some circumstances, a commander may discharge his obligation to prevent or punish an offence by reporting the matter to the competent authorities”.¹²⁸⁶

It is in the context of these elements of the doctrine of command/superior responsibility that Article 28 of the Rome Statute was formulated and it will be interpreted.

5.4.2. Application of Article 28 of the Rome Statute to Peace Support Operations

5.4.2.1. Authority, Command and Control Structure of a Peace Support Operation

Command and superior responsibility is of particular importance in relation to offences committed by peacekeeping personnel. In Chapter 3 the importance of managerial (superior) and commander

¹²⁸¹ *US v von List et al. (Hostage case)*, 8 Law Reports of Trials of War Criminals, 34 (1949); 11 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council No. 10 (1950); *Celebici*, Trial Judgement, para. 707.

¹²⁸² *Celebici*, Trial Judgement, para. 378; *Aleksovski*, Trial Judgement, paras. 81; *Blaskic*, Trial Judgement, paras. 302, 335; *Bemba* Confirmation of Charges, para. 415. A superior cannot be expected “to perform the impossible”; *Celebici*, Trial Judgement, para. 395.

¹²⁸³ *Celebici*, Trial Judgement, para. 395.

¹²⁸⁴ *Hostage case*, 71.

¹²⁸⁵ *Celebici*, Trial Judgement, para. 394.

¹²⁸⁶ *Kvocka et al.*, Trial Judgement, para. 316; *Blaskic*, Trial Judgement, para. 335; *Prosecutor v Strugar*, Trial Judgement, IT-01-42-T (31 January 2005), para. 376.

responsibility was discussed. This importance has been recognised, with the UN taking a compliance-based approach and a risk assessment approach to managerial compliance. We have seen that the Model MoU now contains specific provisions obligating sending states to take action when a commander fails “to cooperate with a UN investigation, fail[s] to exercise effective command and control, or neglect[s] to immediately report to appropriate authorities or take action in respect of allegations of misconduct reported to the commander”.¹²⁸⁷ It is the commander’s “obligation to maintain the discipline and good order of the contingent”.¹²⁸⁸ Fulfilment of these obligations forms part of a commander’s performance appraisal.

These obligations offer an effective starting point from which to examine the criminal responsibility of a PSO superior or commander for gender-based crimes committed by subordinate personnel. However, firstly it is necessary to give an outline of the command structure with a PSO. A PSO is multi-dimensional in its authority, command and control distribution.¹²⁸⁹ There are three dimensions: strategic, operational and tactical.¹²⁹⁰ The strategic aspect of an operation consists of defining objectives and overall planning of general operations.¹²⁹¹ Operational and tactical command deals with the attainment of these objectives in the field.¹²⁹²

The ultimate authority of a PSO is the Security Council, which issues the mandate of the mission, and any subsequent alterations to this mandate. The mandate ultimately controls the direction of the mission operations.¹²⁹³ The Security Council is essentially the head of the strategic dimension of an

¹²⁸⁷ Model MoU, A/61/19 (Part III), Annex, 12 June 2007, Article 7(2) *sexiens*.

¹²⁸⁸ Model MoU, Article 7(4) *sexiens*.

¹²⁸⁹ *United Nations Peacekeeping Operations Principles and Guidelines* (New York: Peacekeeping Best Practices Section, Division of Policy, Evaluation and Training, Department of Peacekeeping Operations, United Nations, January 2008), pp. 66-69, available at http://pbpu.unlb.org/pbps/Library/Capstone_Doctrine_ENG.pdf (hereinafter ‘*DPKO Principles and Guidelines*’).

¹²⁹⁰ Of course, it must be remembered that “the detailed structure of command in a UN force inevitably differs somewhat from situation to situation”; McCoubrey and White, *supra* note 1113, p. 142.

¹²⁹¹ *Ibid.*, p. 138.

¹²⁹² *Ibid.*

¹²⁹³ *Ibid.*, p. 139. However it is the Rules of Engagement (ROE) that ultimately govern any use of force; *ibid.*, p. 146. The Force Commander ultimately defines a mission’s ROE, although national contingents will usually also implement their own; Rowe, ‘Maintaining Discipline’, *supra* note 1113, pp. 59-62.

operation.¹²⁹⁴ Under the Security Council within the strategic dimension is the Secretary-General, the UN Secretariat (as represented by the DPKO and the DFS¹²⁹⁵), and the Head of Mission.

The next dimension to a PSO is operational. In the field, it is the Head of Mission (or Special Representative of the Secretary-General, SRSG) who “exercises operational authority over the United Nations peacekeeping operation’s activities, including military, police and civilian resources”.¹²⁹⁶ The Head of Mission is a civilian, who is under the authority of the Secretary-General (through the Under-Secretary-General for Peacekeeping Operations). The Head of Mission is given “significant delegated authority to set the direction of the mission and to lead its engagement with the political process on the ground”.¹²⁹⁷ The SRSG “is responsible for coordinating the activities of the entire [UN] system in the field”.¹²⁹⁸ The SRSG and deputies form part of a Mission Leadership Team (MLT), which is comprised of the heads of the major functional components of the mission, and is responsible for “overseeing the implementation of the mission’s activities”.¹²⁹⁹

Military personnel are “under the operational control of the United Nations Force Commander or head of military component, but not under United Nations command”.¹³⁰⁰ However, contingent commanders and their personnel are to report to the Force Commander, and to act according to the Force Commander’s orders and directions, and not on national direction;¹³⁰¹ although, as previously discussed, national contingent commanders are responsible for discipline and good order of their contingent members.¹³⁰² Thus, after the Head of Mission and the MLT, the component heads

¹²⁹⁴ J.W. Houck, “The Command and Control of United Nations Forces in the Era of “Peace Enforcement” (1993-1994) 4 *Duke Journal of Comparative and International Law* 1-69, p. 23.

¹²⁹⁵ The DPKO provides policy guidance and strategic direction; the DFS provides logistical and administrative support. *DPKO Principles and Guidelines*, p. 66.

¹²⁹⁶ *Ibid.*, p. 68.

¹²⁹⁷ *Ibid.*

¹²⁹⁸ *Ibid.*

¹²⁹⁹ *Ibid.*

¹³⁰⁰ *Ibid.*

¹³⁰¹ Consultation with national commanders on operational issues has been deemed ‘indispensable’, provided such consultations do “not lead to delays in the execution of tasks or prevent the Mission from retaining the necessary operational flexibility”; Sixth report of the Secretary-General on the United Nations Mission in Sierra Leone, UN Doc. S/2000/832 (24 August 2000), para. 47.

¹³⁰² Model MoU, Article 7 ter Discipline; Article 7 quinquies Exercise of jurisdiction by the Government. Houck, *supra* note 1294, p. 26.

(commanders or civilian superiors) constitute the final element of the operational dimension. The military component heads are appointed by the Force Commander.

The component heads form the highest level in the final dimension of a mission- tactical. Underneath the component heads, there are military units, civilian units, and police units. Civilian regional offices also fall within the tactical sphere, although these are not directly connected to the component heads.

Thus, the authority, command and control structure is constructed as following:

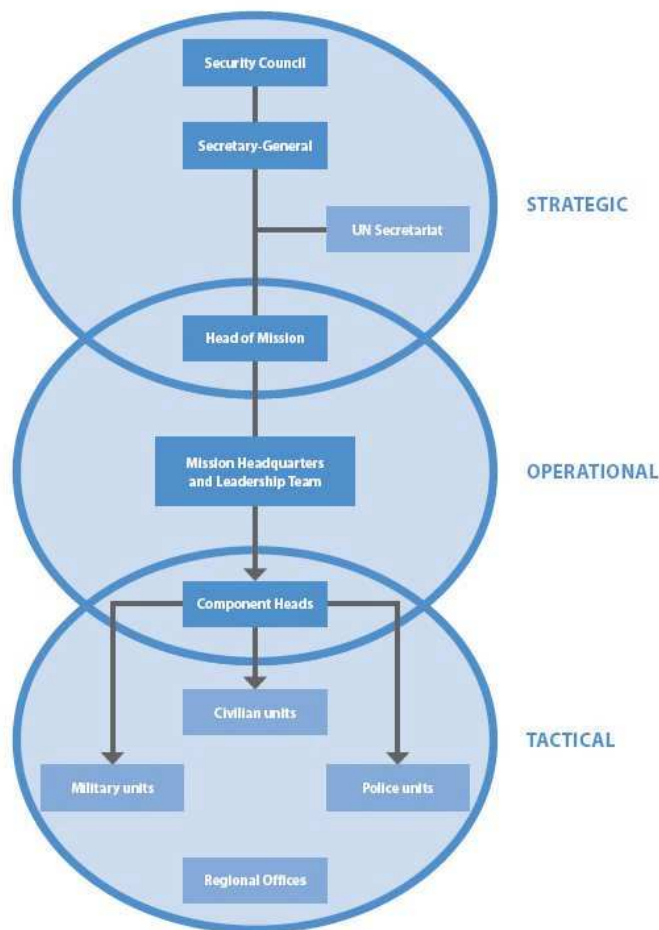


Figure 1 Authority, Command and Control in Multi-dimensional United Nations Peacekeeping Operations¹³⁰³

The command and control structure thus seems fairly structured and straight-forward. Ultimate individual responsibility lies with the Head of Mission; ultimate military responsibility with the Force

¹³⁰³ Figure from *DPKO Principles and Guidelines*, p. 66.

Commander. Under both, there are deputy civilian superiors and military commanders. However, while the structure may seem straight-forward, in praxis applying the criteria of Article 28 may be problematic, particularly with regard to military command.

5.4.2.2. Command Responsibility

The first requirement of Article 28(a) is that there exists a superior-subordinate relationship. The most important aspect of this relationship is not the rank of the superior, but the fact that the commander had command or authority over the subordinate.¹³⁰⁴ Command results in responsibility for those subordinates underneath a commander. The existence of this relationship is inextricably linked to the concepts of command, authority and control, as it is these aspects that demonstrate the existence of the relationship.¹³⁰⁵ If the person responsible is ‘effectively acting as a military commander’, this will be demonstrated by their effective command or authority and control, and this expression indicates that *de facto* command or authority is sufficient under Article 28.¹³⁰⁶ A military commander is a person “formally or legally appointed to carry out a military commanding function (i.e., *de jure* commanders)... irrespective of their rank or level”,¹³⁰⁷ whereas those ‘effectively acting as a military commander’ encompasses “superiors who have authority and control over regular government forces such as armed police units or irregular forces (non-government forces) such as rebel groups, paramilitary units including, inter alia, armed resistance movements and militias that follow a structure of military hierarchy or a chain of command”.¹³⁰⁸ The commander must exercise effective command or authority “at least when the crimes were about to be committed”, and at the time of the commission of the crime.¹³⁰⁹

A military commander or person effectively acting as a military commander will be held criminally responsible for crimes committed by forces *under his or her effective command and control, or effective authority and control*, as a result of his or her failure to exercise control properly over such

¹³⁰⁴ Ambos, ‘Superior Responsibility’, *supra* note 1269, p. 856.

¹³⁰⁵ *Ibid.*, p. 857.

¹³⁰⁶ Bemba Confirmation of Charges, para. 409.

¹³⁰⁷ *Ibid.*, para. 408.

¹³⁰⁸ *Ibid.*, para. 410.

¹³⁰⁹ Bemba Confirmation of Charges, para. 419.

forces.¹³¹⁰ Thus, in the case where a subordinate peacekeeper commits a crime, in order to establish command responsibility, the person or persons who exercise effective command and control, or effective authority and control, over that subordinate, need(s) to be determined.¹³¹¹

The use of both 'command' and 'authority' provides for different superior-subordinate relationships. Command is the power to issue orders.¹³¹² A superior may have authority but not command, but remains responsible for crimes by subordinates. The command or authority and control must be effective. This phrasing allows for both *de jure* and *de facto* command or authority. A *de jure* commander is not *per se* adequate. A commander who does not exercise effective command or authority and control may not be held responsible for crimes committed by superiors because the crimes were outside of their ability to prevent or report.¹³¹³ In contrast, a person with no official rank may exercise *de facto* command or authority and control over others, resulting in a superior-subordinate relationship. Hence, the particular circumstances of command or authority and control of each case must be examined to determine whether a commander held a position in which they exercised effective command or authority and control that would attract responsibility.¹³¹⁴ This would include considering the extent of the command or authority and control- what behaviour was encompassed within the parameters of the command or authority and control? It may be questioned whether the command or authority and control cover only work-related behaviour or if it also includes other activities. In a military setting, as has been discussed in Chapters 3 and 4, acts committed in a soldier's free time are usually still considered within the parameters of military discipline, as military personnel are always representing the military, particularly so when serving overseas.¹³¹⁵

¹³¹⁰ Article 28(a) Rome Statute (emphasis added).

¹³¹¹ *Bemba* Confirmation of Charges, para. 414.

¹³¹² Ambos, 'Superior Responsibility', *supra* note 1269, p. 857.

¹³¹³ Triffterer and Arnold, *supra* note 1277, pp. 825-6; 828.

¹³¹⁴ *Ibid.*, p. 826.

¹³¹⁵ See e.g. *Re Colonel Aird; Ex-parte Alpert* [2004] HCA 44; 220 CLR 308; 209 ALR 311, discussed *supra* Chapter 4.

Command responsibility is a crime by omission- failure to act- rather than a crime committed by positive actions.¹³¹⁶ To fulfil duties that demonstrate control is properly exercised, a commander must

“ensure his forces are adequately trained in IHL; ensure that due regard is paid to IHL in operational decision making; ensure that an effective reporting system is established so that he or she is informed of incidents when violations of IHL might have occurred; monitor the reporting system to ensure it is effective; and take corrective action when he or she becomes aware that violations are about to occur or have occurred”.¹³¹⁷

Requiring a commander to fulfil certain duties indicates that responsibility is attributed when the crime would not have been committed but for the failure of the commander.¹³¹⁸ The crime would not have occurred had the commander fulfilled his duties; as such actions would have prevented the crime from occurring.¹³¹⁹ However, responsibility is also attributed when “the superior’s failure of supervision [merely] increases the risk that the subordinates commit certain crimes”.¹³²⁰ It must also be noted that the crime must have been committed; a commander cannot be held responsible under the Rome Statute for a mere failure to exercise control if no crimes within the jurisdiction of the Court were actually committed.¹³²¹

Failure to exercise such control by a commander may be proven with regard to the duties of commanders that are imposed by the UN, including under the MoU, which specifically obligates the sending state to take action if a commander fails to exercise *effective command and control*.¹³²² Given that commanders are tasked with the implementation of programmes and policies of the UN for the prevention of SEA; and they are being assessed on how they perform these duties, it is clear what method and means of control and authority commanders have and are expected to carry out in

¹³¹⁶ Triffterer and Arnold, *supra* note 1277, p. 823; Mettraux, *supra* note 1280, pp. 37-53, 269.

¹³¹⁷ *Ibid.*, p. 822, citing Fenrick in the 1st edition of the same book.

¹³¹⁸ This is an element of causation; *ibid.* Triffterer and Arnold, *supra* note 1277, pp. 835-6; Mettraux, *supra* note 1280, pp. 87-89.

¹³¹⁹ Ambos, ‘Superior Responsibility’, *supra* note 1269, p. 860. This is distinct from the commander’s or superior’s action causing the crime; B. Swart, ‘Modes of International Criminal Liability’, in Cassese (ed.), *The Oxford Companion to International Criminal Justice*, (Oxford University Press, Oxford 2009), 82-93, p. 88.

¹³²⁰ *Ibid.*, p. 860; Bemba Confirmation of Charges, para. 425.

¹³²¹ Thus a commander cannot be held responsible for an attempted crime that was not carried out due to the interception of the commander; Triffterer and Arnold, *supra* note 1277, pp. 827-8.

¹³²² Model MoU, Article 7(2) *sexiens*; the language used echoes that of Article 28 Rome Statute.

order to prevent and ensure accountability for SEA.¹³²³ Thus, they have the material ability and power to prevent and punish SEA.¹³²⁴ The Prosecutor would be able to use this as evidence (particularly the UN assessments of performance) to determine whether a commander had failed to exercise control over the forces.

Failure to take all necessary and reasonable measures is the second element of omission triggering responsibility, and is the crux of command/superior responsibility.¹³²⁵ A commander who fails to exercise effective control but does take all necessary and reasonable measures to prevent or repress the crimes or to submit the matter to the competent authorities will not be held responsible when subordinates have committed crimes. The failure to take necessary and reasonable measures can be committed intentionally or with negligence. The necessary and reasonable measures must be within the legal competence and the material possibility of the commander.¹³²⁶ Such measures may include the duties mentioned above of ensuring training in and application of IHL, establishment of an effective reporting system, monitoring the system, and taking action for violations.¹³²⁷

The failure to prevent or repress or submit to the competent authorities follows the principle detailed above that command responsibility is based on a failure to act rather than imputed liability for the subordinate's actions.¹³²⁸ Thus the *mens rea* required is one of negligence rather than intent, differentiating Article 28 responsibility from Article 25 criminal responsibility.¹³²⁹

Prevention of a crime takes priority over actions to punish an act. "Obviously, where the accused knew or had reason to know that subordinates were about to commit crimes and failed to prevent them, he cannot make up for the failure to act by punishing the subordinates afterwards."¹³³⁰

Prevention of a crime stops the crime when it has not yet been committed. Repression of a crime

¹³²³ See *supra* Chapter 3.

¹³²⁴ *Bemba* Confirmation of Charges, paras. 415-416.

¹³²⁵ Cryer, 'General Principles', *supra* note 1240, p. 261.

¹³²⁶ Ambos, 'Superior Responsibility', *supra* note 1269, p. 861.

¹³²⁷ See text accompanying note 1317; *Bemba* Confirmation of Charges, para. 438.

¹³²⁸ M. Lippman, 'Humanitarian Law: The Uncertain Contours of Command Responsibility' (2001) 9 *Tulsa Journal of Comparative & International Law* 1-93, p. 86.

¹³²⁹ Criminal responsibility under Article 25 requires intent and knowledge; Article 30 Mental element.

¹³³⁰ *Blaskic*, Trial Judgement, para. 336. See also Additional Protocol I, Articles 86 & 87.

takes place by a commander when a crime is already in the process of being committed. Reporting of the crime to the competent authorities takes place after the fact, with the aim of reporting intended to ultimately result in punishment of the offender through triggering of investigation.¹³³¹

It is notable that Article 28 only requires a commander to prevent or repress the commission of crimes, or to submit the matter to the competent authorities for investigation and prosecution. This is in contrast to the Statutes of the *ad hoc* tribunals, which expressly include command responsibility for failure to punish.¹³³² It is also distinct from customary law, which has developed the requirement to punish perpetrators of international crimes.¹³³³ However, the ICC has elected to interpret 'repress' as encompassing two separate duties at two different stages of the commission of the crimes- a duty to stop ongoing crimes, and to punish forces after the commission of crimes.¹³³⁴ The duty to punish may involve the commander taking necessary measures or by referring the matter to the competent authorities, and which duty is applicable will depend upon the circumstances of the case.¹³³⁵

Command responsibility may ultimately be attributed to the Force Commander, as it is the Force Commander who issues all of the orders for a mission. All military personnel are under the operational control of the Force Commander, who is therefore responsible for directing the behaviour of all mission military personnel. In this regard, the Force Commander must take all necessary and reasonable measures within his or her power to prevent or repress the commission,¹³³⁶ by issuing orders or directives to mission personnel detailing prohibited behaviour, off-limits locations, and consequences for any violations of these orders.

In addition, if the Force Commander *knew, or should have known*¹³³⁷ that military personnel were committing or about to commit such crimes, s/he would be under an obligation to take action to prevent such crimes through his/her position as Force Commander. The knowledge requirement of

¹³³¹ Mettraux, *supra* note 1280, pp. 67, 250-2.

¹³³² ICTY (Article 7(3)), ICTR (Article 6(3)) and SCSL (Article 6(3)), and the Law on the ECCC (Article 29).

¹³³³ Henckaerts and Doswald-Beck, *supra* note 1166, p. 558-563; Additional Protocol I, Article 87(1).

¹³³⁴ *Bemba* Confirmation of Charges, para. 439-440.

¹³³⁵ *Ibid.*, paras. 440-1.

¹³³⁶ Article 28(a)(ii) Rome Statute.

¹³³⁷ Article 28(a)(i) Rome Statute.

Article 28 is likely to follow that of the *ad hoc* tribunal case law: actual knowledge, demonstrated by direct or circumstantial evidence. The determination of knowledge could be ascertained through, *inter alia*, the elements listed by the ICTY in *Celebici*.¹³³⁸ Where a commander *should have known* is likely the equivalent of the constructive knowledge element developed by the ICTY.¹³³⁹ A commander is not required to actively search for information but must acknowledge any information already available to him, and failure to take notice of such information will incur liability.¹³⁴⁰ What the commander knew or should have known will depend on the individual circumstances of the case.¹³⁴¹

One notable aspect of this provision is that it applies to situations where forces were committing or about to commit crimes, but not where a commander knew or should have known that crimes had been committed. This phrasing leaves a gap in the reach of the Court, as on strict application of Article 28, it cannot hold a commander responsible for failure to report a crime he becomes aware of only after it has been committed.¹³⁴²

The fact that the Force Commander ultimately has no disciplinary authority over national contingent members would not bar prosecution, as the Rome Statute does not require a commander to punish the perpetrator, but only to submit the matter to the competent authorities for investigation and prosecution. Thus, the Force Commander would be under an obligation to refer any allegations to both the UN, for administrative disciplinary action, and to the alleged perpetrator's national contingent commander for investigation and prosecution by the sending state authorities. Under the wording of Article 28, this is where the responsibility of the Force Commander would end, as there is no requirement to ensure that investigation or prosecution does actually take place, and no express requirement to punish. Provided the Force Commander has taken all necessary and reasonable

¹³³⁸ See *supra*, text accompanying note 1280.

¹³³⁹ Lippman, *supra* note 1328, pp. 86-87; Ambos, 'Superior Responsibility', *supra* note 1269, p. 864.

¹³⁴⁰ Triffterer and Arnold, *supra* note 1277, pp. 829-30.

¹³⁴¹ Ambos, 'Superior Responsibility', *supra* note 1269, p. 867.

¹³⁴² This also brings into question the ability to prosecute a commander who assumes command after the commission of the crimes and does not take action to report the matter, as he could not have been aware of the crimes until after their commission; Triffterer and Arnold, *supra* note 1277, pp. 836-7.

measures within his or her power to refer the matter to the competent authorities, s/he has fulfilled obligations under Article 28.¹³⁴³

This logic would also apply to commanders ranked under the Force Commander, depending upon their area of command, authority and control. Contingent commanders would likely only be held responsible for the actions of members of their own contingent, as they do not exercise any authority, control or command over members of other national contingent. Responsibility of any commander would have to be assessed by analysing over which subordinates a particular commander held authority, command and control, either *de facto* or *de jure*.¹³⁴⁴

However, there may be problems with the determination of authority. Despite the projected command/authority hierarchy in a mission, the reality is unfortunately that national contingent members sometimes refuse to acknowledge the *de jure* authority and command (as appointed by the Force Commander) of a commander originating from a different sending state.¹³⁴⁵ This is a problem that has been recognised by the UN. For example, national contingents in UNOSOM¹³⁴⁶ were not following mission orders, but instead were following orders from their sending state command, who were also applying mission orders at their own discretion.¹³⁴⁷

It is possible that the Court could find that, in this situation, two commanders in fact had authority and command: the UN-appointed commander and the national contingent commander. The categorisation of the authority as *de jure* or *de facto* would depend on the interpretation of the circumstances. The UN-appointed commander would hold *de jure* authority by means of his/her appointment by the Force Commander, and would be held responsible based on this authority.

¹³⁴³ *Ibid.*, p. 839.

¹³⁴⁴ *RUF Case*, para. 366; *Bemba Confirmation of Charges*, para. 443.

¹³⁴⁵ There may be an “override” of force commanders orders by national contingent commanders, resulting in ‘parallel command’; Murphy, ‘Legal Framework’, *supra* note 1256, p. 55; J.V. Arbuckle, *Military Forces in 21st Century Peace Operations: No job for a soldier?*, (Routledge, Oxon 2006), p. 121.

¹³⁴⁶ United Nations Operation in Somalia.

¹³⁴⁷ The UN found “this made them unreliable in the mission area and reduced the mission's effectiveness”; The Comprehensive Report on Lessons Learned from United Nations Operation in Somalia (UNOSOM) April 1992 - March 1995, paras. 44-46, available at <<http://www.peacekeepingbestpractices.unlb.org/PBPS/Library/UNOSOM.pdf>>. See also C. Gray, ‘Peacekeeping after the Brahimi Report: Is there a crisis of credibility for the UN?’ (2001) 6 *Journal of Conflict and Security Law* 267-288, p. 281; Zwanenberg, *Accountability*, *supra* note 1032, pp. 40-41.

Should that commander carry out their *control effectively*, they would be criminally responsible based on their obligation to prevent or report crimes. However, in praxis the UN-appointed commander may hold no *effective authority and control*, and thus may not be held responsible for the actions of subordinates.¹³⁴⁸ This may be evidenced by the fact that subordinates were not following the commander's orders. As held in *Celebici*, a commander must have *actual control* of the subordinate.¹³⁴⁹ Thus the national contingent commander, whose orders the subordinate was actually following, and therefore had *actual or effective control* of the subordinate, could be deemed to have *de facto* authority.¹³⁵⁰ At the same time, given the fact that a national contingent leader is responsible for the discipline and good order of national contingent members, and thus has the *effective control* and material ability to prevent and punish, the national contingent member could also be found to hold *de jure* authority in this regard. Given the fact that a contingent member is receiving orders from two sources, the national commander and the UN commander,¹³⁵¹ the result is that there are two different commanders who may be held responsible for the actions of the subordinate.

Yet responsibility only attaches if the commander *knew* (actual knowledge)¹³⁵² or, owing to the circumstances at the time, *should have known* (negligence in failing to acquire knowledge)¹³⁵³ about the commission of the crime(s).¹³⁵⁴ There are multiple factors that the ICC is likely to take into account when considering the actual knowledge of a commander. Aspects such as logistics, geographical location, widespread occurrence of the acts, and the location of the commander at the time¹³⁵⁵ will be particularly relevant in relation to a PSO, but may greatly differ between missions, owing to the circumstances at the time. For example, some missions are located in geographically

¹³⁴⁸ Triffterer and Arnold, *supra* note 1277, p. 826; Mettraux, *supra* note 1280, pp. 122-3.

¹³⁴⁹ *Celebici*, Appeal Judgement, para. 255. This control may be direct or indirect; *ibid.*, para. 252.

¹³⁵⁰ One state example is that of Canada, which deems that national command is never withdrawn during any international operation; Murphy, 'Legal Framework', *supra* note 1256, pp. 41-2.

¹³⁵¹ Tittmore, *supra* note 1113, p. 80.

¹³⁵² *Bemba* Confirmation of Charges, para. 429.

¹³⁵³ *Ibid.*, para. 432.

¹³⁵⁴ Article 28(a)(i) Rome Statute.

¹³⁵⁵ *Bemba* Confirmation of Charges, para. 431.

small areas, and do not have a large number of personnel involved. In such a situation, a higher level of knowledge of the Force Commander and other commanders would be expected. For a mission located in an expansive territory (such as the DRC), where units are spread far and wide, it may be less practical for a Force Commander to have knowledge of details of all unit operations. In this latter case, it would be more likely to be unit commanders who would bear responsibility for crimes committed by subordinates. However, in general, the military, and a PSO, are organised structures with established reporting and monitoring systems, rendering it simple to prove actual knowledge.¹³⁵⁶

However, even in the latter case, this would not necessarily absolve the Force Commander of responsibility. It is the responsibility of commanders, including the Force Commander, to be aware of locations designated as off-limits (especially considering that these are also off-limits to commanders), and to maintain awareness that such off-limits orders are being adhered to. It is the responsibility of national commanders to ensure conduct and discipline, and therefore to maintain knowledge that orders and directive relating to conduct and discipline are being implemented and followed by their subordinates. Therefore, if officers are frequenting a 'night club' or bar where it is known that trafficked women are forced to work as prostitutes, or where prostitution in general takes place, commanders should be aware of this activity and take steps to stop it. For example, in the case of Russian soldiers bringing trafficked women onto their KFOR base, "allegedly disguised in Russian army uniforms", for sex work, this activity would be within the knowledge of commanders, as it was taking place on the KFOR base itself.¹³⁵⁷

5.4.2.3. Superior Responsibility

Superior responsibility is the responsibility of non-military, or civilian, leaders for crimes committed by subordinates. The existence of this relationship is also determined in the same manner as a commander-subordinate relationship, by examining effective authority and control.

¹³⁵⁶ *Ibid.*

¹³⁵⁷ 'So does it mean we have the rights?', *supra* note 1241, pp. 44-45.

Within the UN, this will include all levels of superiors up to the SRSG, and possibly even the Secretary-General. As with commanders, a superior must also have *effective authority and control* over the subordinates in question.¹³⁵⁸ This provision is similar to the one under Article 28(a), with the notable difference that there is no requirement of effective command and control. The difference is due to the fact that superior-subordinate relationships differ from commander-subordinate relationships. Command is a military concept without application in a non-military context. Another distinction is that there are likely to be more limitations on the scope of authority and control of a superior.¹³⁵⁹ It may be determined that a subordinate's behaviour in the workplace is the only conduct under the effective authority and control of a superior, while actions committed outside this time and location do not fall within the authority and control of the superior.¹³⁶⁰

There is an additional requirement of superior responsibility, namely that the crimes were within the effective responsibility and control of the superior. This requirement is linked to the concept of effective authority and control. This additional element is again due to the fact that superior-subordinate relationships are very different to military relationships, in which commanders generally exercise authority and control over all areas of a soldier's conduct.¹³⁶¹ With regard to civilian superiors, if the crimes were not within the competence of the superior to control, they cannot be held responsible.¹³⁶² A failure to exercise control properly will be determined in the same manner as those under command responsibility, although duties of a civilian superior may be determined to be different to those of a military commander.¹³⁶³ Again, this will depend on the particular role and status of the superior.

¹³⁵⁸ Article 28(b).

¹³⁵⁹ Ambos, 'Superior Responsibility', *supra* note 1269, p. 858.

¹³⁶⁰ *Ibid.*, p. 858 ; *see also Museuma*, Trial Judgement, para. 880, as discussed *supra*.

¹³⁶¹ Vetter, however, believes this renders Article 28(b)(ii) superfluous, because other aspects of the provision differentiate the military and civilian relationships; Vetter, *supra* note 1269, p. 120.

¹³⁶² Triffterer and Arnold, *supra* note 1277, p. 841.

¹³⁶³ Mettraux, *supra* note 1280, p. 108.

Mission superiors are in a position to take reasonable measures to attempt to prevent or report crimes by their subordinates due to their authority.¹³⁶⁴ Within a PSO, a civilian superior will have *authority and control* over mission civilian personnel, which includes the power to appoint and remove (dismiss and repatriate) UN employees. Which subordinates fall within their authority and control will depend on the exact role of the superior. Superiors have the authority and control to prevent or punish the use of mission property in the commission of crimes (e.g. the use of UN vehicles to transport trafficked women or to visit brothels). Superiors can thus exercise both *de jure* and *de facto* authority and control over their subordinates. At the highest level, the SRSG has *authority and control* over the entire mission, over all military and civilian personnel, and thus could be held responsible for crimes committed by either military or civilian personnel.¹³⁶⁵

As discussed with regard to commanders, superiors within the UN are also specifically tasked with the implementation of programmes and policies of the UN for the prevention of SEA, and are assessed on their performance in this implementation.¹³⁶⁶ This clearly demonstrates that superiors are expressly given the material abilities (and duty) to prevent such crimes, thus rendering SEA prevention within the *effective responsibility and control* of UN managers.¹³⁶⁷ It also demonstrates that a superior is required to maintain awareness (have knowledge) of SEA misconduct, and once that knowledge is acquired, to act upon such information by referral to the relevant disciplinary channels (e.g. the Conduct and Discipline Unit, the Office of Internal Oversight). These requirements and assessments would also be clear evidence for the Prosecutor as to whether or not the superior failed to exercise control properly by taking all necessary and reasonable measures within his or her power to prevent or repress the commission of the crimes, or to submit the matter to the competent authorities for investigation and prosecution.¹³⁶⁸ Fulfilment by a superior of his/her duties with

¹³⁶⁴ *Musema*, Trial Judgement, para. 880.

¹³⁶⁵ The SRSG does not have *command* over the military personnel, but only *authority and control* is required under Article 28(b).

¹³⁶⁶ See *supra* Chapter 3.

¹³⁶⁷ Article 28(b)(ii).

¹³⁶⁸ Article 28(b)(iii).

regard to SEA misconduct would avoid criminal responsibility for not acting on knowledge obtained, but also for consciously disregarding information clearly indicating the commission of crimes.¹³⁶⁹

It is clear that ‘consciously disregarded information’ is a different threshold from that required by command responsibility, as a superior is not held responsible for what they should have known, but rather, if they consciously disregarded information. This means that a superior will be held responsible if they were put on notice of crimes being committed (or about to be) but did not take action on this information. The standard is generally viewed as being lower than that required by a military commander, due to the fact that a military commander “would have far more possibilities to receive information on the conduct of their subordinates”.¹³⁷⁰ This ability is connected with the realm of authority and control exercised by commanders and superiors, which is greater for military commanders than civilian superiors.

Superiors are held responsible if information clearly indicating a significant risk that subordinates were committing or were about to commit crimes existed and was available to the superior; that the superior “declined to refer to the category of information”.¹³⁷¹ This is a criterion similar to the ‘wilful blindness’ concept, which does not presume knowledge, but results in responsibility for ignoring available information.¹³⁷²

The obligation to not consciously disregard information clearly indicating subordinates were committing or about to commit crimes differs from the obligations of military commanders, and is seen as a lower threshold than ‘should have known’.¹³⁷³ The reasoning behind the lower threshold is that civilian superior-subordinate relationships are not of the same mould as military commander-subordinate relationships. The military is built on a system of discipline and good order, and a

¹³⁶⁹ Article 28(b)(i).

¹³⁷⁰ Triffterer and Arnold, *supra* note 1277, p. 841.

¹³⁷¹ *Ibid.*, p. 841.

¹³⁷² Discussed in *Celebici*, Trial Judgement, para. 387. Vetter, *supra* note 1269, p. 124; Ambos, ‘Superior Responsibility’, *supra* note 1269, p. 870.

¹³⁷³ This has been criticised by some, *see* particularly Vetter, *supra* note 1269.

definitive hierarchy based on authority, command and control.¹³⁷⁴ This is not the case with regard to superior-subordinate relationships, which are hierarchical, and involved authority, but do not have such an emphasis on command and control- civilian superiors do not usually have disciplinary powers.¹³⁷⁵ However, this does not absolve civilian superiors of any responsibility, although clearly responsibility will be determined based on the individual circumstances of any case. While superior responsibility for crimes of a high-level politician (such as a head of state) is more obvious, such responsibility of lower level superiors will be more challenging to ascertain. However, within the UN, it is the responsibility of superiors to refer any allegations to the appropriate authorities, both within the UN for administrative investigation and disciplinary action (potentially dismissal and repatriation), and with regard to military personnel, to the national contingent commander.

5.4.3. Conclusion

It is clear that command and superior responsibility are particularly relevant forms of criminal responsibility for crimes committed by peacekeeping personnel. Both military commanders and civilian superiors have an express duty to ensure prevention and punishment of misconduct, in particular sexual exploitation and abuse.¹³⁷⁶ In addition, military commanders are tasked with the discipline and good order of their forces.¹³⁷⁷ This in fact places quite a high level of responsibility upon mission commanders and superiors with respect to these particular crimes, and would in turn assist with prosecution as the duties of superiors and commanders are expressly articulated in regulations and agreements, and followed up by performance appraisals. Were the ICC to be seized of jurisdiction over cases of sexual exploitation and abuse by peacekeeping personnel, then it would be vital to explore the responsibility of any superiors and commanders, to ensure accountability at all

¹³⁷⁴ See discussion *supra* Chapters 3 & 4.

¹³⁷⁵ Triffterer and Arnold, *supra* note 1277, p. 841.

¹³⁷⁶ *Supra* Chapter 3; Model MoU.

¹³⁷⁷ Model MoU.

levels for such crimes and to seek to prevent further failures by commanders and superiors to exercise control and authority over their subordinates.¹³⁷⁸

Criminal responsibility before the ICC is thus possible for perpetrators and their superiors or commanders. Yet, as Chapter 3 revealed, a variety of immunities will be applicable to all personnel, and it must be examined how immunities can be dealt with in the ICC.

5.5. Immunities

Linked with the concept of both individual criminal responsibility and command/superior responsibility of peacekeeping personnel is the issue of immunity. Immunity of mission personnel has been addressed in Chapter 3; an immunity of some category is attached to all mission personnel.¹³⁷⁹

The Rome Statute was drafted with the express intention of creating a court that could prosecute anyone for the serious international crimes under its jurisdiction, regardless of their status. Under the Rome Statute, any official position is no bar to prosecution by the ICC. Article 27 specifically states that the Rome Statute applies “equally to all persons without distinction based on official capacity”, and that immunities “shall not bar the Court from exercising its jurisdiction over” any person, which includes officials of international intergovernmental organisations.¹³⁸⁰ Article 27 is based on the idea that those “who abuse their official position and the powers flowing from it cannot avail themselves of that position to obtain impunity from crimes committed”.¹³⁸¹ This principle is particularly pertinent with regard to peacekeeping personnel and sexual exploitation, which has been recognised as an abuse of position and power.¹³⁸² It also stems from the rejection of the application of any type of immunity to international crimes, as “those responsible for such crimes

¹³⁷⁸ Particularly given the fact that such responsibility is customary law; Henckaerts and Doswald-Beck, *supra* note 1166, pp. 558-563.

¹³⁷⁹ See Appendix 2.

¹³⁸⁰ P. Gaeta, 'Official Capacity and Immunities', in Cassese, et al. (eds.), *The Rome Statute of the International Criminal Court*, Vol. I, (Oxford University Press, Oxford 2002), 975-1002, p. 991. See also *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)*, judgement of 14 February 2002 (*Arrest Warrant Case*), para. 61; and *Prosecutor v Taylor*, Decision on Immunity from Jurisdiction, SCSL-2003-01-I (31 May 2004), para. 52: “the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court”.

¹³⁸¹ Gaeta, *ibid.*, p. 990.

¹³⁸² *Supra* Chapters 2 and 3.

cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity”.¹³⁸³ This is in part because the crimes are viewed as acts not committed as part of official capacity “because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform”¹³⁸⁴ and in part because such crimes are so heinous that no immunity should bar prosecution.¹³⁸⁵

Article 27 is linked to Article 98. While Article 27(2) states that immunities “shall not bar the Court from exercising its jurisdiction over” a person with official capacity, Article 98(1) prohibits the Court from proceeding with a request for surrender or assistance if such a request would result in the requested state acting “inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person... unless the Court can first obtain the cooperation of that *third State* for the waiver of the immunity”.¹³⁸⁶ Article 98(2) applies the prohibition with regards to “international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court”, unless the Court obtains the consent of the sending State. It is generally agreed that Article 98(2) is intended to apply to situations governed by SOFAs¹³⁸⁷ - under which personnel of the sending state are granted immunity and are subject only to the jurisdiction of their sending state with regard to crimes.¹³⁸⁸ However, Fleck argues that in fact, SOFAs and Article 98(2) deal with different subject matter, and therefore there is no contradiction between Article 98(2) and SOFAs.¹³⁸⁹ SOFAs deal with conditions under which jurisdiction may be exercised by the

¹³⁸³ *Prosecutor v Blaskic*, Appeal Chamber Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (29 October 1997), para. 41.

¹³⁸⁴ *Arrest Warrant Case*, joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, para. 85.

¹³⁸⁵ “Immunity should never apply to crimes under international law, neither before international courts nor national courts.” *Arrest Warrant Case*, dissenting opinion of Judge van den Wyngaert, para. 36; *see also* joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, para. 85. Werle, *supra* note 1039, p. 31; C. Kress and K. Prost, 'Article 98 Cooperation with respect to waiver of immunity and consent to surrender', in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., (C.H.Beck, Hart, Nomos, Muenchen, Oxford, Baden-Baden 2008), p. 1609.

¹³⁸⁶ Emphasis added.

¹³⁸⁷ There was widespread reference to SOFAs in the negotiations of Article 98(2); *See also* Broomhall, *supra* note 1056, p. 148 ; D. Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1 *Journal of International Criminal Justice* 618-650, p. 644; Kress and Prost, *supra* note 1385, p. 1615; Werle, *supra* note 1039, p. 240 fn. 561.

¹³⁸⁸ *Supra* Chapter 3.

¹³⁸⁹ J. Paust, 'The Reach of ICC Jurisdiction Over Non-Signatory Nationals' (2000) 33 (1) *Vanderbilt Journal of Transnational Law* 1-11, pp. 6-7; D. Fleck, 'Are Foreign Military Personnel Exempt from International Criminal

sending state and host state over crimes committed by sending state military personnel in the territory of the host state. In the case of UN PSOs, Chapter 3 has discussed the UN SOFA with host states, which expressly grants exclusive criminal jurisdiction over a national to the sending state.¹³⁹⁰ Article 98(2) refers to agreements under which the consent of a sending state is required to surrender a person to the ICC. Fleck rightly points out that the latter situation is not mentioned at all in SOFAs.¹³⁹¹ Using this logic, the surrender of military peacekeeping personnel by the host state would require agreement of the sending state, and hence fall under Article 98(1) as a waiver of immunity by a state. Given these two distinct views on Article 98 and SOFAs, it will remain to be seen how the Court will interpret the relationship between SOFAs and Article 98. However the chance for the Court to interpret the application of a SOFA under Article 98 would only arise in the specific circumstances where the host state is seeking to surrender a national of a sending state to the ICC, as only the host state is a party to the SOFA. Should a perpetrator be apprehended by a third state (i.e. not the sending state or the host state), that third state is under no obligation from the UN SOFA as it is not a party to the agreement.

With regards to peacekeeping personnel, it has been noted that personnel fall under different jurisdictional and disciplinary authorities.¹³⁹² Military personnel are subject only to their sending state jurisdiction, and thus it is up to the sending state to waive any immunity.¹³⁹³ Whether military personnel fall under the ambit of Article 98(1) or 98(2), either way problems may arise. Even though a sending state may not be willing or able to undertake prosecution of a peacekeeper perpetrator, they may not be willing to either surrender the perpetrator or to waive immunity to enable another state (e.g. the host state) to surrender the perpetrator.¹³⁹⁴ Potential unwillingness to do so has been

Jurisdiction under Status of Forces Agreements?' (2003) 1 (3) *Journal of International Criminal Justice* 651-670, pp. 656, 669. This argument is also put forward by other scholars: Akande, *supra* note 1387, p. 644.

¹³⁹⁰ See *supra* Chapter 3.3 Jurisdiction.

¹³⁹¹ *Ibid.*

¹³⁹² Appendix 2.

¹³⁹³ Article 7 quinquies Exercise of jurisdiction by the Government, Revised Model MoU, Report of the Special Committee on Peacekeeping Operations and its Working Group on the 2007 resumed session, A/61/19 (Part III), Annex, 12 June 2007.

¹³⁹⁴ Fleck, 'Foreign Military Personnel', *supra* note 1389, pp. 60-61.

clearly demonstrated by the so-called 'Article 98 Agreements' that the US engaged in following the establishment of the ICC.¹³⁹⁵ Such agreements were made with a number of state parties to the Rome Statute, each of them agreeing not to surrender any US personnel to the ICC.¹³⁹⁶ In addition, the US also succeeded in the obtaining of Security Council resolutions deferring for a period of 12 months any ICC investigation of peacekeeping personnel from states not party to the Rome Statute.¹³⁹⁷ However, the US was only successful in doing so for two years, as an attempt to renew the deferrals for a third year in 2004 lacked support within the Security Council. This lack of support for exempting peacekeeping personnel from ICC jurisdiction is heartening, but at the same time it is difficult to envisage that in praxis states would willingly surrender one of their own national peacekeeping personnel.¹³⁹⁸

Unfortunately, in addition, the Security Council referral of the situation in Sudan to the ICC exempts nationals, current or former officials or personnel from a contributing state outside Sudan which is not a party to the ICC from ICC jurisdiction.¹³⁹⁹ Such persons are declared "subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such

¹³⁹⁵ S. Zappala, 'The Reaction of the US to the Entry into Force of the ICC Statute: Comments on UN SC Resolution 1422 (2002) and Article 98 Agreements' (2003) 1 (1) *Journal of International Criminal Justice* 114-134; D.J. Scheffer, 'Article 98(2) of the Rome Statute: America's Original Intent' (2005) 3 (2) *Journal of International Criminal Justice* 333-353, pp. 341-2.

The US also passed national legislation, the American Servicemembers' Protection Act of 2002. The ASPA prevents the ICC from giving aid to the ICC, and it also authorises the US to use "all means necessary and appropriate" to free US government employees and other certain individuals from detention by the ICC (which has resulted in the ASPA being nicknamed 'The Hague Invasion Act'); 'American Servicemembers' Protection Act' (2002) 96 (4) *American Journal of International Law* 975-977; L.J. Faulhaber, 'American Servicemembers' Protection Act of 2002' (2003) 40 (2) *Harvard Journal on Legislation* 537-557; M.T. Johnson, 'The American Servicemembers' Protection Act: Protecting Whom?' (2003) 43 *Virginia Journal of International Law* 405-484; M.E. Lantto, 'The United States and the International Criminal Court: A Permanent Divide?' (2008) 31 *Suffolk Transnational Law Review* 649-646, pp. 630-635.

¹³⁹⁶ These agreements are a violation of Article 86 of the Rome Statute, which obligates state parties to cooperate with the Court; Fleck, 'Foreign Military Personnel', *supra* note 1389, p. 654; 'International Criminal Court: The unlawful attempt by the Security Council to give US citizens permanent impunity from international justice' (Amnesty International, London, May 2003) IOR 40/006/2003.

¹³⁹⁷ S/RES/1422 (2002); S/RES/1487 (2003). See 'Efforts to Obtain Immunity from ICC for U.S. Peacekeepers' (2002) 96 (3) *American Journal of International Law* 725-729; Amnesty, 'ICC: the unlawful attempt', *ibid.*; S. Zappala, 'Are Some Peacekeepers Better Than Others? UN Security Council Resolution 1497 (2003) and the ICC' (2003) 1 *Journal of International Criminal Justice* 671-678; Kress and Prost, *supra* note 1385, p. 1605.

¹³⁹⁸ Broomhall, *supra* note 1056, p. 149.

¹³⁹⁹ S/RES/1593 (2005).

exclusive jurisdiction has been expressly waived by that contributing State”.¹⁴⁰⁰ While this is not a blanket exemption of all UN missions’ personnel from ICC jurisdiction, it does set a potentially damaging precedent for situations referred by the Security Council to the ICC to include an exemption from ICC jurisdiction for mission personnel. Damaging, as it will deny the ICC the ability to exercise jurisdiction over nationals of non-state parties involved in missions. The wording of the resolution appears to cover all personnel, both civilian and military: “nationals, current or former officials or personnel from a contributing state”. In reality, however, this is not clear; the language used is not consistent with the language used in other mission documents such as the MoU, where terms used include ‘sending state’ and ‘national contingent members’ (to expressly refer to military personnel).¹⁴⁰¹ The phrase “from a contributing state” indicates military or police personnel only, but the terms “nationals, current or former officials or personnel” seems to cover a broader range of persons and may include all persons involved in a mission. Therefore the practical application of the resolution may result in debate over who is actually covered by the exemption.

For UN officials and experts on mission, it is the Secretary-General (as representative of the UN) who must waive any immunity.¹⁴⁰² There is no provision in the Rome Statute providing for the Court to suspend a request for surrender or assistance if it would require the requested state to act inconsistently with an obligation under international law with regards to a waiver of immunity that would be granted by *an international organisation*.¹⁴⁰³ Therefore, it can be argued that personnel whose immunity must be waived by the Secretary-General do not fall within the ambit of Article 98, resulting in no bar of the Court to proceed with a request for surrender or assistance relating to a UN official or expert on mission. In addition, the UN has concluded a Relationship Agreement with the

¹⁴⁰⁰ S/RES/1593, para. 6.

¹⁴⁰¹ See discussion in Chapter 3.

¹⁴⁰² Convention on the Privileges and Immunities of the United Nations, Article V Section 20 and Article VI Section 23.

¹⁴⁰³ Article 98(1) expressly deals with relations between two states; Gaeta, ‘Official Capacity’, *supra* note 1380, p. 996.

ICC.¹⁴⁰⁴ Through this agreement, the UN and the ICC agree to cooperate and consult with each other on matters of mutual interest.¹⁴⁰⁵ In particular, if the Court seeks to exercise jurisdiction over someone who falls within the ambit of the Convention on the Privileges and Immunities of the United Nations,¹⁴⁰⁶ the UN “undertakes to cooperate fully with the Court and to take all necessary measures to allow the Court to exercise its jurisdiction, in particular by waiving any such privileges and immunities in accordance with the Convention on the Privileges and Immunities of the United Nations and the relevant rules of international law”.¹⁴⁰⁷ This indicates that the UN expressly intends to waive any immunity of its personnel who commit crimes within the jurisdiction of the ICC. Evidently, the application of this article of the Relationship Agreement remains to be tested, but to date other provisions of the Relationship Agreement have been carried out.¹⁴⁰⁸ This hopefully sets a precedent for the UN to fulfil its obligations under Article 19 of the Agreement and thus to ensure that immunity of any peacekeeping personnel sought by the ICC is not an impediment to prosecution.

5.6. Prosecutorial Discretion: The Big Fish/Small Fish Debate and the Gravity Threshold

Once the hurdle of immunity has been cleared, there remain other potential barriers to prosecution. Under the Rome Statute, the Prosecutor has been afforded considerable discretion, particularly with regard to his ability to select situations and cases to investigate and prosecute.¹⁴⁰⁹ There are two

¹⁴⁰⁴ Negotiated Relationship Agreement between the International Criminal Court and the United Nations, ICC-ASP/3/Res.1, entered into force 4 October 2004.

¹⁴⁰⁵ Relationship Agreement, Article 3 Obligation of cooperation and coordination.

¹⁴⁰⁶ That is, for PSOs, UN Officials and Experts on Mission.

¹⁴⁰⁷ Relationship Agreement, Article 19 Rules concerning United Nations privileges and immunities.

¹⁴⁰⁸ Relationship Agreement, Article 18 Cooperation between the United Nations and the Prosecutor; *see e.g.* in *Lubanga*, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, ICC-01/04-01/06-1401 (13 June 2008); and Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", ICC-01/04-01/06-1486 (21 October 2008).

¹⁴⁰⁹ *See e.g.* A.P. Rubin, 'The International Criminal Court: Possibilities for Prosecutorial Abuse' (2001) 64 (1) *Law and Contemporary Problems* 153-165; G. Turone, 'Powers and Duties of the Prosecutor', in Cassese, et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary Volume II*, (Oxford University Press, Oxford 2002), 1137-1180; A. Marston Danner, 'Enhancing the Legitimacy and Accountability of

areas within this discretion that may significantly impact on the potential for peacekeeping personnel to be prosecuted before the ICC. The first of these is the status of peacekeeping personnel as ‘big fish’ or ‘small fish’. This section will introduce the big fish/small fish debate, and then examine peacekeeping personnel as both big fish and small fish. The second area of prosecutorial discretion concerns the application of the gravity threshold as found in Article 17(1)(d). Prosecutorial policy and the case law of the ICC to date which deal with the gravity threshold will be discussed in the context of peacekeeping personnel.

5.6.1. The Big Fish/Small Fish Debate

“[T]o every woman who is raped, the fish who did it is plenty big.”¹⁴¹⁰

There has been a trend in the *ad hoc* tribunals to prosecute only those people in senior positions, whether military or civilian- the ‘big fish’.¹⁴¹¹ The ICTY was criticised for its prosecution of lower-ranking perpetrators- the ‘small fish’.¹⁴¹² In the completion strategies of the ICTY and the ICTR, both Tribunals have been urged to concentrate “on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes”, and to transfer “cases involving intermediate- and

Prosecutorial Discretion at the International Criminal Court' (2003) 97 (3) *American Journal of International Law* 510-552; M.R. Brubacher, 'Prosecutorial Discretion within the International Criminal Court' (2004) 2 *Journal of International Criminal Justice* 71-95; H.B. Jallow, 'Prosecutorial Discretion and International Criminal Justice' (2005) 3 *Journal of International Criminal Justice* 145-161; D.D.N. Nsereko, 'Prosecutorial Discretion before National Courts and International Tribunals' (2005) 3 *Journal of International Criminal Justice* 124-144; L. Côté, 'Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law' (2005) 3 *Journal of International Criminal Justice* 162-186; A.K.A. Greenawalt, 'Justice Without Politics? Prosecutorial Discretion and the International Criminal Court' (2007) 39 *NYU Journal of International Law and Politics* 583-673; H. Takemura, 'Big Fish and Small Fish Debate- An Examination of the Prosecutorial Discretion' (2007) 7 *International Criminal Law Review* 677-685; W.A. Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court' (2008) 6 (4) *Journal of International Criminal Justice* 731.
¹⁴¹⁰ C.A. MacKinnon, 'The ICTR's Legacy on Sexual Violence' (2008) 14 *New England Journal of International and Comparative Law* 101-110, p. 106.

¹⁴¹¹ The Nuremberg and Tokyo Tribunals also focused on the prosecution of senior leaders; Schabas, 'Prosecutorial Discretion', *supra* note 1409, p. 9. For support for this policy, see A. Cassese, 'The ICTY: A Living and Virtual Reality' (2004) 2 *Journal of International Criminal Justice* 585-597, p. 595; P.M. Wald, 'ICTY Judicial Proceedings: An Appraisal from Within' (2004) 2 *Journal of International Criminal Justice* 466-473, pp. 468-9; S.E. Smith, 'Inventing the Laws of Gravity: The ICC's Initial Lubanga Decision and its Regressive Consequences' (2008) 8 *International Criminal Law Review* 331-352, pp. 338-340.

¹⁴¹² Smith, *ibid.*, p. 339.

lower-rank accused to competent national jurisdictions”.¹⁴¹³ The situation with regards to the ICC is, however, not so clear-cut, as prosecutorial policy and case law demonstrates.

In following with this trend, the ICC Prosecutor’s Policy Paper, released in 2003, states:

“The global character of the ICC, its statutory provisions and logistical constraints support a preliminary recommendation that, as a general rule, the Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes.”¹⁴¹⁴

The policy statement apparently takes its phrasing from the Statute of the Special Court for Sierra Leone, which exercises jurisdiction over “persons who bear the greatest responsibility for serious violations of international humanitarian law”.¹⁴¹⁵

However, the Rome Statute does not share this wording. Article 1 grants the ICC jurisdiction over “persons for the most serious international crimes”, without reference to those bearing ‘the greatest responsibility’.¹⁴¹⁶ This Office of the Prosecutor (OTP) Policy Paper does in fact follow the Rome Statute fairly accurately, by referring to those in leadership positions as *an example* of the persons who may bear the greatest responsibility for crimes committed. The Prosecutorial Policy does not restrict the OTP to seeking prosecution only of high-ranking perpetrators, and expressly recognises that “in some cases, the focus of an investigation by the Office of the Prosecutor may go wider than

¹⁴¹³ S/RES/1503 (2003). *See also* Security Council Resolution 1534, calling on the ICTR and ICTY “in reviewing and confirming any new indictments, to ensure that any such indictments concentrate on the most senior leaders suspected of being the most responsible for crimes within the jurisdiction of the relevant Tribunal...” S/RES/1534 (2004). *See* Smith, *ibid.*, pp. 339-340.

¹⁴¹⁴ Paper on some policy issues before the Office of the Prosecutor, September 2003, *available at* http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf (hereinafter OTP Policy Paper), p. 7.

¹⁴¹⁵ Article 1 of the Statute of the Special Court for Sierra Leone. W.A. Schabas, *An Introduction to the International Criminal Court*, 3rd ed., (Cambridge University Press, Cambridge 2007), p. 34.

¹⁴¹⁶ In any case, the phrase ‘those who bear the greatest responsibility’ or alternate phrasings such as ‘those most responsible’ is a general phrase and should not be equated with ‘senior leaders’. The Law On The Establishment Of Extraordinary Chambers In The Courts Of Cambodia For The Prosecution Of Crimes Committed During The Period Of Democratic Kampuchea (27 October 2004, NS/RKM/1004/006) grants the ECCC competence over “senior leaders... and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979”. Thus there is a distinct separation of command/superior responsibility and individual criminal responsibility, and the competence of the ECCC is not limited only to senior leaders.

high-ranking officers”.¹⁴¹⁷ However, this investigation is to be undertaken “if investigation of certain types of crimes or those officers lower down the chain of command is necessary for the whole case”.¹⁴¹⁸ It is notable that there is no reference made to the prosecution of lower-ranking offenders (that is, a case), only to investigation. It may be possible to infer that the OTP would prosecute if the elements of crimes committed by a lower-ranking perpetrator were in existence. However this is not a wise inference, as in the work of the ICC and the OTP in particular, there is a distinct separation between investigation and prosecution.¹⁴¹⁹

Article 25 of the Rome Statute provides the Court with the power to hold persons who commit crimes under its jurisdiction individually responsible- any persons, regardless of leadership or other position with a group, entity or organisation. This jurisdiction includes cases where the person acts as an individual, jointly with others, or orders, solicits or induces the commission of such a crime.¹⁴²⁰ Superior responsibility and command responsibility, however, are separate categories of criminal responsibility under the Rome Statute.¹⁴²¹ In addition, Article 33 proscribes the use of superior orders as grounds for excluding criminal responsibility (except under certain circumstances).¹⁴²² A contextual interpretation of these articles of the Rome Statute indicates that such explicit separation of categories of individual criminal responsibility means that the ICC was intended to exercise jurisdiction not only over those in command or control who ordered crimes (or failed to stop them), but over perpetrators at all levels who committed crimes.¹⁴²³

The ICC has addressed the issue of the Court prosecuting only the most senior leaders suspected of being most responsible, in the context of gravity. Pre-Trial Chamber I held in the *Lubanga/Ntaganda* Arrest Warrant ruling that the senior position of a perpetrator as a mandatory element of the gravity

¹⁴¹⁷ OTP Policy Paper, *supra* note 1414, p. 7.

¹⁴¹⁸ *Ibid.*

¹⁴¹⁹ *E.g.* the distinction in Article 53 between investigation initiation and prosecution initiation. *See* Part 5. Investigation and Prosecution in general.

¹⁴²⁰ Article 25. Individual criminal responsibility.

¹⁴²¹ Article 28 Responsibility of commanders and other superiors. *See* discussion *supra* Command and Superior Responsibility.

¹⁴²² Article 33 Superior orders and prescription of law.

¹⁴²³ *Ntaganda* Arrest Warrant Appeal, para. 78.

threshold.¹⁴²⁴ This decision was criticised as both an inappropriate restriction on prosecutorial discretion and an element of the gravity threshold set far too high.¹⁴²⁵ On appeal, however, the Appeals Chamber deemed it more logical “to assume that the deterrent effect of the Court is highest if no category of perpetrators is *per se* excluded from potentially being brought before the Court”.¹⁴²⁶ In fact, the imposition of such a rigid test may result in a lack of accountability or deterrence, as only those of the highest ranks would be subject to the ICC’s jurisdiction. As the Appeals Chamber held, the “particular role of a person... may vary considerably depending on the circumstances of the case and should not be exclusively assessed or predetermined on excessively formalistic grounds”.¹⁴²⁷ Importantly, the Appeals Chamber recognised that subordinates, or lower-ranked personnel, “may still carry considerable influence and commit, or generate the widespread commission of,¹⁴²⁸ very serious crimes... predetermination of inadmissibility on [the grounds of superior or subordinate categorisation] could easily lead to the automatic exclusion of perpetrators of most serious crimes in the future”.¹⁴²⁹ Further, the Appeals Chamber considered the Rome Statute itself, and that the prosecution of only senior leaders would conflict with a contextual interpretation of the Statute: the inclusion of command/superior responsibility as a separate mode of responsibility; Article 27(1) which provides that the Statute applies equally to all persons; and that the Preamble does not make reference to those ‘most responsible’, only “those responsible”.¹⁴³⁰

It should not be presumed that the only important cases will be those which focus on senior leaders. While the ICTY, in its final years, seeks now to prosecute only senior leaders,¹⁴³¹ this has not always been the case, and in fact, cases dealing with low-ranking perpetrators have been some of the most

¹⁴²⁴ *Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58*, Pre-Trial Chamber I, 10 February 2006, No.: ICC-01/04-01/07 (*Lubanga/Ntaganda* Arrest Warrant Pre-Trial Decision), paras. 51 and 63.

¹⁴²⁵ R. Murphy, ‘Gravity Issues and the International Criminal Court’ (2006) 17 *Criminal Law Forum* 281-315, p. 293; M.M. El Zeidy, ‘The Gravity Threshold Under the Statute of the International Criminal Court’ (2008) 19 *Criminal Law Forum* 35-57, p. 49; Smith, *supra* note 1411, p. 340.

¹⁴²⁶ *Ntaganda* Arrest Warrant Appeal, para. 73.

¹⁴²⁷ *Ibid.*, para. 76.

¹⁴²⁸ The Court here is mentioning widespread commission of crimes, but must recall its statement only paragraphs before that this is not a requirement of war crimes.

¹⁴²⁹ *Ntaganda* Arrest Warrant Appeal, para. 77.

¹⁴³⁰ *Ibid.*, paras. 78-79.

¹⁴³¹ The completion strategy for the *ad hoc* tribunals is set out in Security Council Resolution 1534.

important in the ICTY's jurisprudence and in international criminal law. One such case is the *Furundzija* case, as mentioned above, the significance of which cannot be understated with regards to crimes of sexual violence.¹⁴³² At the time of commission of the crimes, Furundzija was a local commander of a special unit of military police, and in fact was of equal rank to 'Accused B', who was the physical perpetrator of the rape.¹⁴³³ Furundzija was found guilty of individual criminal responsibility for the acts, and not for superior responsibility, which was not sought by the ICTY OTP.¹⁴³⁴

5.6.1.1. Peacekeeping Personnel as Small Fish

Flexibility in the interpretation of both Article 1 and the gravity threshold with respect to the category of persons to be prosecuted would be essential in any attempt to bring a peacekeeper before the ICC. Peacekeeping personnel consist of people of all levels in the hierarchy, from entry level civilians and military personnel to the Force Commander and SRSG. While reports do not detail the rank of peacekeeping personnel against whom allegations of sexual exploitation and abuse are made, it can be assumed that lower-ranking personnel are involved (without excluding the possibility of such crimes being committed by senior leaders). If the basic separation of perpetrators into big and small fish, based on hierarchical rank, is to be followed, then clearly lower-ranking personnel will be categorised as small fish.

However, even if such low-ranking peacekeeping personnel are deemed small fish, this does not mean that they should be excluded from the jurisdiction of the Court. The reasoning of the Appeal Chamber in the *Ntaganda* Arrest Warrant Appeal demonstrates that it is vital not to preclude the prosecution of lower-ranking persons as they may be perpetrators of most serious crimes under the

¹⁴³² *Furundzija*, Trial Judgement. Another important case is *Tadic*, the first case before the ICTY, in which the Appeals Chamber took strides with "a broad and innovative reading of the two categories of war crimes in the Statute of the Tribunal, affirming that international criminal responsibility included acts committed during internal armed conflict". *Tadic*, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995), IT-94-1-AR72. Schabas, *An Introduction to the ICC*, *supra* note 1415, p. 115.

¹⁴³³ *Furundzija*, Trial Judgement, para. 262. Accused B beat and raped Witness A while Furundzija questioned her.

¹⁴³⁴ *Furundzija*, Trial Judgement, paras. 187-189. See also *Prosecutor v Furundzija*, Amended Indictment, (2 June 1998), IT-95-17/1-PT.

jurisdiction of the Court. Therefore, in the case where a peacekeeper has committed a crime that falls within the subject-matter jurisdiction of the ICC, such as sexual slavery or sexual violence, where there is no national entity willing or able to prosecute, the ICC Prosecutor should step forward to prosecute- regardless of the seniority of the peacekeeper.

5.6.1.2. Peacekeeping Personnel as Big Fish

Clearly, peacekeeping personnel of senior ranking will be classified as big fish- particularly the Force Commander or the SRSG. However, it is the argument of this thesis that all peacekeeping personnel, regardless of rank, should be considered 'big fish'. It is the position of peacekeeping personnel as protectors of civilians, as those who are tasked with advancing human rights and creating a secure and stable environment,¹⁴³⁵ that should render them 'big fish' regardless of their actual rank or position. The special status of peacekeeping personnel is already enshrined in the Rome Statute. Under the Rome Statute, it is a war crime to intentionally direct attacks against personnel involved in a humanitarian assistance or peacekeeping mission in accordance with the UN Charter.¹⁴³⁶ The Prosecutor has recently requested ICC judges to issue arrest warrants for Sudanese rebel leaders believed to be responsible for an attack on peacekeeping personnel in September 2007, which resulted in eight peacekeeping personnel injured and 12 killed.¹⁴³⁷ Given the fact that the number of killed and injured is very similar to the number in the Iraq communication, which was deemed to be an insufficient number of deaths and injured victims to satisfy the gravity threshold,¹⁴³⁸ there must be an additional reason why this incident is considered grave enough.¹⁴³⁹ It is suggested that this reason is the status of peacekeeping personnel- in this case, as victims. It is especially abhorrent to attack people who are charged with protecting the safety and security of civilians, and the

¹⁴³⁵ DPKO Principles and Guidelines, pp. 14 and 23.

¹⁴³⁶ Articles 8(2)(b)(iii) and 8(2)(e)(iii).

¹⁴³⁷ Press Release, "Attacks on peacekeepers will not be tolerated", ICC Prosecutor presents evidence in third case in Darfur', The Hague, 20 November 2008, ICC-OTP-20081120-PR374_ENG, available at <http://www.icc-cpi.int/press/pressreleases/446.html>.

¹⁴³⁸ See discussion *infra*.

¹⁴³⁹ The gravity threshold is found in Article 17(1)(d). See *infra* for further discussion of The Gravity Threshold.

Prosecutor spoke of how the attack directly affected “aid and security for millions of people of Darfur who are in need of protection”.¹⁴⁴⁰

If peacekeeping personnel are afforded special status as victims, then a special status as perpetrators should also be bestowed upon them.¹⁴⁴¹ There should be no double standard as to the status of peacekeeping personnel. As the ICTR has stated, punishment for those who commit war crimes should “be applicable to everyone without discrimination”, as “international humanitarian law would be lessened and called into question if it were to be admitted that certain persons be exonerated from individual criminal responsibility for a violation of [international humanitarian law] under the pretext that they did not belong to a specific category”.¹⁴⁴² If it is especially heinous for peacekeeping personnel to be victims of crimes under the Rome Statute, then it should be equally heinous if they commit one of those crimes. Their commission of international crimes risks the success of a PSO through the distrust created in the local population and the global community, resulting in endangerment to both the local population and to international peace and security. Therefore, given the important role of a peacekeeper and the integral link between this role and the success of the mission, their ranking or position within the mission (or their own armed forces) should not be relevant, and a peacekeeper should be automatically deemed a big enough fish for the ICC to catch.

5.6.2. The Gravity Threshold

The greatest challenge to the exercise of ICC jurisdiction over peacekeeping personnel may well be the gravity threshold. The gravity threshold is found in Articles 17(1)(d), 53(1)(b) and 53(2)(b). Article 17(1)(d) requires a case to be of sufficient gravity to justify further action by the Court; and Article 53 obligates the Prosecutor to consider the gravity of a situation or case when deciding whether to

¹⁴⁴⁰ Press Release, “Attacks on peacekeepers will not be tolerated”, *supra* note 1437.

¹⁴⁴¹ In this respect, the situation must be differentiated from children, who afford special status as victims but not as perpetrators of crimes as child soldiers. The difference is that peacekeepers are adults charged with a specific role of upholding rule of law and human rights, and are mentally capable of appreciating the consequences of their actions. In contrast, child soldiers are recruited unwillingly, commit their crimes under duress, and are too young to be considered capable of truly understanding the consequences of their actions (age-related incapacity for the true elements of *mens rea* is a grounds for exclusion of criminal responsibility); Article 26 excludes jurisdiction of the ICC over persons aged under 18 at the time of the offence.

¹⁴⁴² *Akayesu*, Appeal Judgement, (1 June 2001), ICTR-96-4-A, para. 443.

initiate an investigation or a prosecution. As gravity has not been defined in the Rome Statute, the first determinations of the application of the gravity threshold in the ICC are to be found in prosecutorial policy and assisted by the Court's Decisions on the Prosecutor's Application for Warrants of Arrest for Thomas Lubanga Dyilo and Bosco Ntaganda.¹⁴⁴³ This section will examine how the direction being taken by the Prosecutor and by the Pre-Trial Chamber could impinge on the possibility of a peacekeeper being prosecuted by the ICC.

5.6.2.1. Prosecutorial Application of the Gravity Threshold

The Prosecutor has made clear the direction that his office will take with regards to the application of the gravity threshold.¹⁴⁴⁴ The elements that will be considered by the OTP will include:

Leaders/those who bear most/the greatest responsibility for the crimes (such as the leaders of the State or organisation);

The degree of participation in the commission of the crime;

The number of victims (killed and of other crimes against physical integrity);

The impact of the crimes;

The scale of the crimes;

The manner of commission of crimes; and

The nature of the crimes.¹⁴⁴⁵

However, what appear to be the most important of those elements so far in prosecutorial decisions relating to situations or cases are the position of a person as a leader, and the number of victims.

¹⁴⁴³ *Lubanga/Ntaganda* Arrest Warrant Pre-Trial Decision); *Ntaganda* Arrest Warrant Appeal.

¹⁴⁴⁴ OTP Policy Paper, *supra* note 1414; Statement by Luis Moreno-Ocampo, Informal meeting of Legal Advisors of Ministries and Foreign Affairs, New York, 24 October 2005; Statement by Luis Moreno-Ocampo, Fourth Session of the Assembly of States Parties, 28 November 2005; The Office of the Prosecutor, Report on the activities performed during the first three years (June 2003- June 2006), 12 September 2006; The Office of the Prosecutor, Report on Prosecutorial Strategy, 14 September 2006 (hereinafter Prosecutorial Strategy); Background Situation in the Central African Republic, 22 May 2007, ICC-OTP-BN-20070522-220-A_EN.

¹⁴⁴⁵ *Ibid.*

In February 2006, the Prosecutor released a letter detailing how the OTP had addressed communications concerning alleged crimes committed in Iraq.¹⁴⁴⁶ In this communication, the Prosecutor addressed allegations concerning wilful killing or inhuman treatment of civilians. “[I]t was concluded that there was a reasonable basis to believe that crimes within the jurisdiction of the Court had been committed, namely wilful killing and inhuman treatment.”¹⁴⁴⁷ Once this basis was established, the Prosecutor then turned to assess whether the gravity threshold was satisfied, stating that the “Office considers various factors in assessing gravity. A key consideration is the number of victims of particularly serious crimes...”¹⁴⁴⁸ The number of alleged victims of wilful killing and inhuman treatment amounted to a total less than 20. The Prosecutor then made a direct comparison with the number of victims in the other situations currently under investigation by the Court, which number in the hundreds or thousands, and determined that “the situation did not appear to meet the required [gravity] threshold of the Statute”.¹⁴⁴⁹ No further assessment of any other gravity factors were made, such as impact of the crimes, manner of commission of the crimes or nature of the crimes. Thus, in his application of the facts of the relevant alleged crimes in Iraq, the Prosecutor in fact applied only one element as the gravity threshold test- that of the number of victims.¹⁴⁵⁰ In contrast, the Prosecutor has announced a preliminary investigation into “serious allegations surrounding the events of 28 September 2009” in Conakry in Guinea.¹⁴⁵¹ The events on this day apparently included rape and killing of civilians by armed forces, but the number of victims of rape

¹⁴⁴⁶ Iraq Communication, *supra* note 1093.

¹⁴⁴⁷ *Ibid.*

¹⁴⁴⁸ *Ibid.*

¹⁴⁴⁹ *Ibid.*

¹⁴⁵⁰ See discussion of the Iraq communication in Murphy, ‘Gravity Issues’, *supra* note 1425, pp. 309-311; M. O’Brien, ‘The Impact of the Iraq Communication of the Prosecutor of the International Criminal Court on War Crimes Admissibility and the Interests of Victims’ (2007) Symposium Edition *University College Dublin Law Review* 109-125; El Zeidy, *supra* note 1425, pp. 40-41; S.A. Williams and W.A. Schabas, ‘Article 17 Issues of Admissibility’, in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., (C.H. Beck, Hart, Nomos, Muenchen, Oxford, Baden-Baden 2008), 605-625, pp. 621-2; Schabas, ‘Prosecutorial Discretion’, *supra* note 1409, pp. 5-6; Heller, *supra* note 1096, p. 234.

¹⁴⁵¹ ICC Office of the Prosecutor, ‘ICC Prosecutor confirms situation in Guinea under examination’, 14 October 2009. “On Monday 28 September, police opened fire on tens of thousands of people gathered at the national stadium in Conakry, in order to protest against the junta that seized power in a bloodless coup last December. Despite the ban by the junta, which had been announcement on national radio and television networks on Sunday evening, demonstrators took to the streets.” OCHA Guinea, Victims of security forces crackdown Situation, Report No. 1, 2 October 2009. The situation itself raises other issues of whether the conduct amount to war crimes or crimes against humanity, but that is out of the scope of this thesis.

and killing is estimated at less than 200 in total.¹⁴⁵² A larger number are reported to have been wounded.¹⁴⁵³ Thus, it seems the Prosecutor is not applying consistent standards of gravity when considering which situations to investigate. In addition, it may be questioned what the number of victims is that would satisfy the gravity threshold.¹⁴⁵⁴ However it must be noted that the Guinea situation is only under preliminary investigation, as the Iraq situation had been, and it remains to be seen whether the OTP will initiate a full investigation.¹⁴⁵⁵

Should the requirement of a large number of victims be continued as prosecutorial policy in the application of the gravity threshold, then it would be very challenging to successfully pass such a threshold in relation to gender-based crimes committed by peacekeeping personnel. Such crimes are not committed on a massive scale; they tend to be isolated incidents; or if they are on-going (such as continued sexual exploitation), the total number of victims would not be sufficient to pass the Prosecutor's high threshold. While UN reports detail several hundred complaints in a yearly period,¹⁴⁵⁶ these are from different missions around the world, which indicates that these crimes are not being committed on a large scale in one geographical location.¹⁴⁵⁷

If a quantitative approach is to be applied, the crimes could be examined in the overall context in which they occur. Peacekeeping missions are often located in areas in which armed conflict is ongoing, which may involve the commission of crimes within the ICC's jurisdiction. For example, if a peacekeeper with MONUC, UMAMID or UNMIS was to commit rape or sexual exploitation, this conduct should be viewed within the broader context of the ongoing crimes being committed in the DRC or Sudan.¹⁴⁵⁸ Crimes under the Rome Statute are analysed in their context according to the chapeau elements. The rape or sexual exploitation should not be considered as an incident isolated

¹⁴⁵² OCHA Guinea, Victims of security forces crackdown Situation, Report No. 1, 2 October 2009; Report No. 2, 8 October 2009; Report No. 3 18 October 2009; available at <http://ochaonline.un.org/guinea>.

¹⁴⁵³ *Ibid.*

¹⁴⁵⁴ This author has previously questioned what the 'magic number' is; see O'Brien, *supra* note 1450, p. 115.

¹⁴⁵⁵ See Articles 15 and 53 Rome Statute.

¹⁴⁵⁶ Secretary-General's Reports of sexual exploitation and abuse investigation data, A/58/777 for 2003; A/59/782 for 2004; A/60/861 for 2005; A/61/957 for 2006; A/62/890 for 2007; A/63/720 for 2008.

¹⁴⁵⁷ See CDU website Statistics by mission.

¹⁴⁵⁸ See *supra* for further discussion on this with regards to the chapeau elements of war crimes.

from the other crimes being committed, as they are committed in that context. Therefore the total number of victims of crimes will be far greater, thereby satisfying a qualitative approach to the gravity threshold. The ICC Prosecutor has in fact already set a precedent for lower numbers of victims by requesting arrest warrants for Sudanese rebel commanders for an attack on peacekeeping personnel that resulted in the death of 12 peacekeeping personnel and injured another eight.¹⁴⁵⁹ Such an attack could be placed in the broader context of the on-going armed conflict and alleged commission of crimes such as genocide in Darfur, rendering this one attack part of a large-scale commission of crimes. This reasoning could be followed in the case of a peacekeeper committing a crime. It would not be relevant that a peacekeeper was not a member of a party involved in the armed conflict (e.g. government forces or rebel forces), as the crime would still be part of the overall large-scale commission of international crimes. It is clear, however, that the Prosecutor has instead chosen to apply qualitative reasoning, and selected the incident due to such factors as the nature, manner and impact of the crimes.¹⁴⁶⁰ This is a promising application of non-quantitative factors in gravity decisions.¹⁴⁶¹

Even without the context of mass crimes, a single war crime should be enough for a prosecution, and in fact such a case may have an unforeseen impact on the formulation of international criminal law precedent. The ICTY OTP came under fire, given the limited resources of the Tribunal, for the choice to prosecute a case that centred on a low-ranking perpetrator for his role in the rape of a single victim.¹⁴⁶² Yet that case became one of the most significant judgements in international criminal law. In *Furundzija*, the Tribunal found the accused guilty of rape, as torture and as outrages upon personal dignity.¹⁴⁶³ It was a groundbreaking case, as it was “the first international war crimes trial in history

¹⁴⁵⁹ Office of the Prosecutor, “Attacks on peacekeepers will not be tolerated”. ICC Prosecutor presents evidence in third case in Darfur’, Press Release ICC-OTP-20081120-PR374, 20 November 2008; ‘Pre-Trial Chamber I requests additional information in relation to the application for a warrant of arrest for three rebel commanders in Darfur’, Press Release ICC-CPI-20081210-PR381, 10 December 2008. The Prosecutor has been successful in the arrest of one suspect; see *The Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09.

¹⁴⁶⁰ *Prosecutor v Abu Garda*, Decision on the Confirmation of Charges, ICC-02/05-02/09 (8 February 2010), para. 31.

¹⁴⁶¹ Heller, *supra* note 1096, p. 243 fn. 133.

¹⁴⁶² Askin, ‘Furundzija’, *supra* note 1176, p. 936.

¹⁴⁶³ *Furundzija*, Trial Judgement. This case is discussed in more details *supra*.

to focus almost exclusively on the *actus reus* of rape”,¹⁴⁶⁴ and further developed the meaning of rape in international law.¹⁴⁶⁵ Prosecution of a peacekeeper for a single crime or a small number of crimes would likely be of great significance in international criminal law- precisely for the fact that the accused would be a peacekeeper, a representative of the UN and the international community. It would demonstrate that a person responsible for a crime or crimes under the ICC’s jurisdiction, regardless of the number of victims, cannot avoid punishment.¹⁴⁶⁶

It has been argued that one aspect of gravity that the Prosecutor should consider is the fact that the crimes were committed by state actors, such as government officials or military personnel.¹⁴⁶⁷ This is an excellent criterion to apply to gravity, and the example of peacekeeping personnel is ideal to demonstrate. Peacekeeping personnel represent both the UN and their states. In particular, military personnel remain agents of their sending state.¹⁴⁶⁸ It is unacceptable for perpetrators of international crimes to avoid accountability simply because they are agents of the state (or the UN). Peacekeeping personnel often work in failed states- states in which people can no longer rely on the state as a protector of their rights.¹⁴⁶⁹ Instead, peacekeeping personnel are the ones ensuring these rights. If it is heinous for the state to violate these rights through international crimes, then it is equally so for peacekeeping personnel to do the same.

The Prosecutor should examine a case using all the criteria listed in the OTP Policy Paper, Prosecutorial Strategy, and other statements made relating to the elements of gravity. As mentioned above, these would not be limited to a quantitative analysis of the number of victims, but also include the degree of participation in the commission of the crime; the impact of the crimes; the manner of commission of crimes; and the nature of the crimes.¹⁴⁷⁰ As Schabas states, “gravity has a

¹⁴⁶⁴ Askin, ‘Trial of Furundzija’, *supra* note 1462, p. 955.

¹⁴⁶⁵ *Furundzija*, paras. 174-186.

¹⁴⁶⁶ Applying the principle discussed *supra* in the Introduction and Immunities.

¹⁴⁶⁷ Schabas, ‘Prosecutorial Discretion’, *supra* note 1409, p. 10; Heller, *supra* note 1096, p. 237.

¹⁴⁶⁸ *Supra*, text accompany note 1145.

¹⁴⁶⁹ Heller, *supra* note 1096, pp. 240-242.

¹⁴⁷⁰ *Supra* note 1445.

qualitative as well as quantitative dimension".¹⁴⁷¹ With regard to these categories, the impact of the crimes has been addressed in Chapter 2, resulting in the violation of a significant number of the victims' rights. The degree of participation would be relevant when examining a crime that involves more than one perpetrator, such as trafficking or enforced prostitution. In the latter offence, for example, the degree of participation may be differentiated by such roles as falsifying documents compared to selling a victim to a brothel. The manner of commission of the crimes may be seen in a similar comparative light- for example, is the crime particularly vicious and violent? For example, participation as a rapist in a gang rape is far more severe than warning a brothel owner of an impending raid. However, in contrast, the nature of the crime may result in differing conclusions as to gravity- the nature of the crime of warning a brothel owner of an impending raid results in a continuation of the crime of enforced prostitution and trafficking. Each crime has ongoing ramifications, but they differ. A violent rape results in physical and mental trauma for the victim, but allowing a brothel to continue to function, results in more women being treated as sexual slaves, enforced into prostitution.

One additional factor that could be addressed as an element of gravity is an examination of the victim or victims themselves. When the victims are particularly vulnerable, such as children, the elderly, or pregnant women the crime is rendered grave. In the case of peacekeeping personnel engaging in sexual relations with young girls, the gravity of this is evident in that the victims are children incapable of making valid decisions about their sexual autonomy. With regard to adult women, while their age does enable them legally capable of decision-making, the overall circumstances of their situation need to be examined. These circumstances have been discussed in Chapter 2: poverty, armed conflict and discrimination create a situation of desperation in which women have no real choice or control over their bodies or livelihood, and therefore are vulnerable.

¹⁴⁷¹ Schabas, *An Introduction to the ICC*, *supra* note 1415, p. 191; *see also* Williams and Schabas, *supra* note 1450, p. 622.

5.6.2.2. Pre-Trial Chamber Application of the Gravity Threshold

The day after the Iraq communication was released, the Pre-Trial Chamber I decision of 10 February 2006 in the *Lubanga* and *Ntaganda* cases considered the issue of “whether the cases against Mr Thomas Lubanga Dyilo and Mr Bosco Ntaganda meet the gravity threshold provided for in Article 17(1)(d) of the Statute”.¹⁴⁷² The decision involved a detailed analysis of the requirements of gravity, developing what it termed a three-pronged test, requiring that conduct must be either systematic or large-scale and cause social alarm; and that only the most senior leaders be prosecuted by the Court. This test was, however, subsequently overturned by the Appeals Chamber.¹⁴⁷³

In overturning the Pre-Trial Chamber decision, the Appeals Chamber was able to determine what is *not* required in the test for gravity, but unfortunately in that ruling did not submit any clarification as to what *does* constitute the elements of gravity for the Court to consider. The Appeals Chamber first held that, in relation to war crimes, there is no requirement that the conduct be systematic or large-scale. It was pointed out that it is expressly stated in the Rome Statute that crimes against humanity must be committed as part of a widespread or systematic attack, but Article 8 grants jurisdiction in respect of war crimes *in particular* when committed as part of a plan or policy or as part of a large-scale commission of such crimes. ‘Systematic’ is not a requirement at all under Article 8, and large-scale commission or part of a policy “is not absolute but qualified by the expression ‘in particular’”.¹⁴⁷⁴ The Appeals Chamber established that to impose such a requirement would be inconsistent with Article 8.

As to the Pre-Trial Chamber’s opinion that the crime(s) must cause ‘social alarm’ to the international community, the Appeals Chamber upheld the Prosecutor’s argument that the criterion of ‘social alarm’ is dependant “upon subjective and contingent reactions to crimes rather than upon their objective gravity”.¹⁴⁷⁵ The Appeals Chamber held that the “subjective criterion of social alarm therefore is not a consideration that is necessarily appropriate for the determination of the

¹⁴⁷² *Lubanga/Ntaganda* Arrest Warrant Pre-Trial Decision, section II.2.2.

¹⁴⁷³ *Ntaganda* Arrest Warrant Appeal, paras. 68-82.

¹⁴⁷⁴ *Ibid.*, para. 70.

¹⁴⁷⁵ *Ibid.*, para. 72.

admissibility of a case pursuant to article 17(1)(d) of the Statute”.¹⁴⁷⁶ The expression ‘social alarm’ has been held by El Zeidy to be a “weird novelty of the Chamber”,¹⁴⁷⁷ but by Heller to be “a better indicator of situation gravity than the number of victims”.¹⁴⁷⁸ Heller’s reasoning is certainly valid,¹⁴⁷⁹ however El Zeidy has reason to criticise the choice of phrasing in ‘social alarm’. In lieu of such a phrase, the Court would be better to adopt the broader criterion listed by the Prosecutor of ‘impact of the crimes’.¹⁴⁸⁰ Reference to the impact of the crimes can encompass the impact of the crimes on both victims and the international community. Heller’s reasoning for maintaining the criterion of ‘social alarm’ is that investigating crimes that have an impact on the international community “regardless of their number of victims has far greater *expressive value* than investigating crimes that involve numerous victims but are not particularly socially alarming”.¹⁴⁸¹ This is because “punishment affirms the value of law, strengthens social solidarity, and incubates a moral consensus among the public”.¹⁴⁸² The symbolism of international criminal justice is to ensure prosecutions are conducted for crimes that do shock the conscience of the international community, and crimes with a lesser number of victims can also have such an impact. Certainly crimes committed by peacekeeping personnel have a negative impact on both their victims and the international community, and can even have an impact on peace and security in the region in which the mission is located.¹⁴⁸³ In this respect such crimes can be considered particularly grave.

¹⁴⁷⁶ *Ibid.* This phrasing (“admissibility of a case”) had led one commentator to point out that “nothing in the Appeal’s Chamber judgment... prohibits the OTP from considering the social alarm caused by a particular kind of crime when determining the gravity of a *situation*”; Heller, *supra* note 1096, p. 233; *see also* El Zeidy, *supra* note 1425, pp. 47-48.

¹⁴⁷⁷ However El Zeidy provides little analysis of the term, viewing the Pre-Trial Chamber’s language as “confusing”; El Zeidy, *supra* note 1425, p. 45.

¹⁴⁷⁸ Heller, *supra* note 1096, pp. 233, 236.

¹⁴⁷⁹ *Ibid.*, pp. 233-237.

¹⁴⁸⁰ *Supra* note 1444.

¹⁴⁸¹ Heller, *supra* note 1096, p. 236.

¹⁴⁸² M.A. Drumbl, *Atrocity, Punishment, and International Law*, (Cambridge University Press, Cambridge 2007), p. 17.

¹⁴⁸³ As discussed in Chapter 2, crimes by peacekeepers can jeopardise a mission by creating distrust amongst the local population and the international community.

The Pre-Trial Chamber's second and third prongs of the test, requiring only the prosecution of senior leaders as this would have the most deterrent effect, have been discussed above with regards to the big fish/small fish debate.

The Pre-Trial Chamber decision made reference to decisions of the ICTR and ICTY which have addressed the issue of gravity. The *ad hoc* tribunals have considered gravity when addressing the referral of an indictment to another court. In such application, pursuant to Rule 11 *bis* of the ICTY Rules of Procedure and Evidence, which permits referral of a case to a national jurisdiction, the Tribunal must consider the gravity of the crimes charged.¹⁴⁸⁴ In doing so, the ICTY held that the gravity "depends on the circumstances and context in which the crimes were committed and must also be viewed in the context of other cases tried by this Tribunal".¹⁴⁸⁵ The Tribunal seems to have considered number of victims, time period of the crimes, and geographical scope as the three main factors to determine gravity. The level of responsibility of the accused is addressed separately, and is not an element of gravity in 11 *bis* decisions.¹⁴⁸⁶ The ICTY has, for example, considered "a single military incident which lasted a limited period of time and occurred within a relatively confined geographical area" as "not so serious as to preclude the possibility of trial in Croatia".¹⁴⁸⁷ Yet it has also considered enslavement of nine women and girls over a three month period, and rape of two of the women;¹⁴⁸⁸ persecution, murder and inhumane treatment of a large number of victims in two camps over a three month period;¹⁴⁸⁹ torture and rape of 16 victims over four months;¹⁴⁹⁰ and "persecution, torture and beating, wilful killing and murder, imprisonment, inhumane acts, cruel

¹⁴⁸⁴ Rules of Procedure and Evidence, IT/32/Rev 39 (22 September 2006) Rule 11 *bis* (C).

¹⁴⁸⁵ *Prosecutor v Ademi and Norac* IT-04-78-PT, Decision for referral to the authorities of the Republic of Croatia pursuant to rule 11 *bis* (14 September 2005), para. 28.

¹⁴⁸⁶ *E.g. Ademi and Norac*, paras. 28-29; *Prosecutor v Mejakic et al.*, Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11 *Bis*, IT-02-65-PT (20 July 2005), paras. 21, 26.

¹⁴⁸⁷ *Ademi and Norac*, para. 28.

¹⁴⁸⁸ *Prosecutor v Stankovic*, Decision on Referral of Case under Rule 11 *Bis*, IT-96-23/2-PT (17 May 2005), para. 19.

¹⁴⁸⁹ *Mejakic et al.*, para. 21.

¹⁴⁹⁰ *Prosecutor v Jankovic*, Decision on Referral of Case under Rule 11 *Bis*, IT-96-23/2-PT (22 July 2005), para. 19; upheld by the Appeals Chamber Decision on Rule 11 *Bis* Referral, IT-96-23/2-AR11*bis*.2, paras. 21-22.

treatment, and enslavement of a large number of detainees over a significant length of time”¹⁴⁹¹ to be not so grave to preclude transfer to national courts.

Despite the seemingly arbitrary nature of the decisions as to the number of victims required for crimes to be determined sufficiently grave to be tried by the ICTY, the ICC Pre-Trial Chamber used these decisions as a referential authority for using number of victims (or as it put it, large-scale commission) as an aspect of gravity. However, the ICTY is making such decisions of gravity from a completely different position from the ICC, a fact which did not go unnoticed by the Appeals Chamber. The *Ntaganda* Appeal wisely points out that the ICC is an ongoing institution without the constraints of completion strategy that the ICTY is working under.¹⁴⁹² The ICTY is forced to make a selection between cases due to lack of time (and resources) to prosecute all cases resulting from the armed conflict in the former Yugoslavia. The ICC has no constraints on the time for investigations or prosecutions.¹⁴⁹³ There are definitively other courts in which these cases are being prosecuted. This is not the case with ICC situations, in which no national court systems are set up to undertake prosecutions of perpetrators of international crimes.¹⁴⁹⁴ Therefore the ICC is the only Court willing and able to prosecute such perpetrators. While the ability and willingness of a state to investigate and prosecute is a separate issue to gravity,¹⁴⁹⁵ this may be a consideration for the ICC Prosecutor to consider- what is the impact of these crimes and is such an impact exacerbated by lack of accountability? These issues are clearly not an element of the ICTY’s *11bis* decisions. Thus the context of the ICTY gravity decisions, made for referral to national courts, is completely dissimilar from the concept of gravity with regards to admissibility under Article 17(1)(d) of the Rome Statute. Therefore the *11bis* decisions may be considered but should not be followed by the ICC with regard to Article 17(1)(d).

¹⁴⁹¹ *Prosecutor v Rasevic and Todovic*, Decision on Referral of Case under Rule 11 *Bis*, IT-97-25/A-PT (8 July 2005), para. 23.

¹⁴⁹² *Ntaganda* Arrest Warrant Appeal, para. 80.

¹⁴⁹³ Of course time for trials must be within reason to ensure fair trials. It is also true that the ICC does also not exist with unlimited resources, and is to a certain extent constrained by limited resources.

¹⁴⁹⁴ This does not mean to say that this cannot happen in the future.

¹⁴⁹⁵ Article 17(1)(a) Rome Statute.

Pre-Trial Chamber I of the ICC has subsequently stated several factors that are required to satisfy the Article 17 gravity threshold, in the *Abu Garda* Confirmation of Charges.¹⁴⁹⁶ While the PTC declined to confirm the charges against the accused due to evidentiary reasons, it was found that the case itself was of sufficient gravity under Article 17.¹⁴⁹⁷ The Court assessed the nature, manner and impact of the attack on peacekeepers in question, and specifically noted that “the gravity of a given case should not be assessed only from a quantitative perspective, i.e. by considering the number of victims; rather, the qualitative dimension of the crime should also be taken into consideration”.¹⁴⁹⁸ The Chamber also referred to factors relevant in sentencing which could be used as guidelines for the evaluation of the gravity threshold under Article 17. Such factors are “the extent of damage caused, in particular, the harm caused to victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime”.¹⁴⁹⁹ The Chamber considered the disruption that the attack caused to the PSO and the wider effect on civilians in Darfur. It was concluded that “the consequences of the attack were grave for the direct victims of the attack, that is, the AMIS personnel, and for their families”, and had “a grave impact on the local population”. This contextual analysis of the gravity of the crime is well-placed as a precedent for prosecuting peacekeeping personnel. In particular, the wider effect on civilians, and disruption to a PSO caused by criminal conduct by peacekeepers (e.g. distrust) is a crucial element in the gravity assessment of crimes committed by peacekeepers.¹⁵⁰⁰

From the Appeals Chamber *Ntaganda* judgment, it can be established that requirements of an assessment of gravity under Article 17(1)(d) do *not* include a systematic or large-scale commission (with respect to war crimes); any ‘social alarm’ caused to the international community; or the seniority of the perpetrator in question. This is in fact quite positive when considering the prosecution of a peacekeeper, who may be low-ranking and may have committed a crime that was

¹⁴⁹⁶ *Abu Garda*, Confirmation of Charges, paras. 31-33.

¹⁴⁹⁷ Para. 34.

¹⁴⁹⁸ Para. 31.

¹⁴⁹⁹ Referring to rule 145(1)(c) of the Rules of Evidence and Procedure, at para. 32.

¹⁵⁰⁰ *Supra* Chapter 2.2.5 Effects on the Mission of Sexual Exploitation and Abuse by Peacekeepers.

not part of a systematic or large-scale commission. As now held by Pre-Trial Chamber I, the factors that should be applied as part of the gravity threshold in relation to these crimes are the impact of the crimes on the victims, their families, and the international community; the nature of the crime; the position of the perpetrator *in that he is a peacekeeper*; and the manner of commission of the crime.

5.7. Conclusion

This chapter has examined several different areas that may be problematic when seeking the prosecution of peacekeeping personnel before the ICC. Gender-based crimes committed by peacekeeping personnel may not fall within the substantive jurisdiction of the Court. The chapeau elements may create a significant stumbling block. Depending on the circumstances in which the crime was committed, the Court may need to take a broad interpretation of some chapeau elements such as the nexus to armed conflict in order to find that it has substantive jurisdiction for war crimes. This would, however, be less difficult than situating a crime by a peacekeeper as part of a widespread or systematic attack on a civilian population. Individually, rape and sexual slavery are clear provisions, and will also cover trafficking. Prostitution-related activities and sexual exploitation, however, will be somewhat more difficult to charge under the Rome Statute, and would require creativity by the Prosecutor and the Chambers in interpreting the existing provisions. These difficulties, however, do not mean that substantive jurisdiction does not exist. It would simply require expansive interpretation and application of the Rome Statute provisions and the Elements of Crimes.

Beyond the substantive jurisdiction of the ICC, problematic areas have been demonstrated to exist with respect to immunities and prosecutorial discretion. However, it has also been shown that such problems can be overcome. Immunity should not amount to a problem, provided the UN upholds the Relationship Agreement provision in which it has agreed to waive immunity. However, with regards to national military personnel, it is up to the states to waive immunity, and they may not be willing to

do so. It would be hoped that states who are not willing or able to prosecute their own personnel would waive such immunity. However, this may result in implications for the UN for troop provision: if a soldier is sent to the ICC, states may be unwilling to provide personnel for missions.¹⁵⁰¹ Such a consideration will have to be taken into account, but if it is a state sending its own personnel, then that state has chosen to do so and cannot hold the UN to blame over this action.

Should immunities be waived, there is next the matter of prosecutorial discretion. The Prosecutor has been specific in his reasons for selecting cases, generally based on the number of victims as an indicator of the gravity of the situation to investigate and cases to prosecute. This is undoubtedly the biggest hurdle to be overcome on a peacekeeper's road to the ICC. Only if the Prosecutor were to take the view that a peacekeeper is a 'big fish' to be prosecuted, taking such action as a means of ensuring the principles of individual criminal responsibility are applied in that no one person is beyond accountability, would a peacekeeper end up before the ICC. It would be up to the Prosecutor to recognise that, regardless of the number of victims, ensuring accountability for peacekeeping personnel for crimes such as rape, sexual slavery and sexual exploitation is important as these crimes are grave indeed. The application of gravity should be a malleable concept, applied both subjectively and objectively so that it takes account of broader general issues but also the individual circumstances of the particular situation or case.

One of the reasons behind the need for the Prosecutor to exercise discretion in choice of cases is that the ICC does not work with unlimited resources, and this is a valid motivation. That being said, a case involving crimes by peacekeeping personnel would be of a much smaller scale than the massive situations currently before the court, and as a result would require far less resources and time to investigate and prosecute. Therefore it would make sense for the Court to take on some smaller scale cases in order to advance its own jurisprudence and to demonstrate the ability of the Court to bring cases to completion, without having to rely only on cases that take years to investigate and prosecute.

¹⁵⁰¹ Broomhall, *supra* note 1056, p. 149.

Ultimately, the difficulty of bringing a peacekeeper to justice before the ICC demonstrates the necessity for states to exercise their jurisdiction. States will also have more resources to prosecute their own personnel of all ranks. As detailed in Chapter 4, states can adequately prosecute peacekeeping personnel for crimes such as rape, sexual slavery and sexual exploitation by ensuring they have comprehensive substantive provisions and that such provisions are applicable extraterritorially. These provisions may provide for the individual elements of the crimes without necessarily having additional elements such as those required under the Rome Statute for war crimes and crimes against humanity, thus eliminating a significant challenge to ICC jurisdiction. Sending states also automatically have the right to exercise criminal jurisdiction over their own military personnel, without concern of immunity issues. The ICC was designed to be a court of last resort, functioning as part of a system of complementarity with states. The ICC should never be discounted as a forum in which to prosecute peacekeepers, but the challenges reveal that it is unlikely that peacekeepers will find themselves before the ICC.

6. Conclusion

This thesis began by questioning whether and why gender-based violence against women by peacekeepers should be criminalised. Criminalisation is sought for the purposes of prevention and punishment of such conduct. Proscribing violence against women such as sexual exploitation and prostitution-related activities by peacekeepers contributes to protecting the interests of the women, the community, and society. It has been demonstrated that sexual exploitation and abuse amounts to harm against the women involved through the violation of many rights, such as the right to health and the right to life. It may even amount to harm to the peacekeepers if they contract an STI or HIV. Thus, the harm caused justifies criminalisation.

However, criminalisation cannot be approached without first considering alternative forms of regulation. Hence, this thesis has examined codes of conduct (both national and UN), as well as UN regulations and resolutions. The involvement of the UN in prevention and punishment of misconduct is fundamental, and thus UN-issued regulations and resolutions are crucial in the elimination of misconduct by peacekeepers. UN-wide regulation of conduct, in conjunction with the newly established system of monitoring and reporting, attention to welfare, and imposition of command and superior responsibility, has been an essential factor in the reduction of the number of allegations of misconduct in PSOs. The UN has established the Conduct and Discipline Unit, dedicated entirely to working with those issues.

One of the most interesting developments to stem from the UN's investigations into conduct, discipline and accountability, is the drafting of a Draft Convention on Criminal Accountability of UN Officials and Experts on Mission. This thesis has established that the Draft Convention could be of significant assistance in the criminalisation of sexual misconduct by peacekeeping personnel. This is particularly so given the examination of national jurisdictions undertaken in Chapter 4. It was necessary to examine the role and ability of national jurisdictions in ensuring criminal accountability for their own personnel, due to the inability of the UN to exercise criminal jurisdiction, and the fact

that sending states retain jurisdiction over their national personnel. UN regulations may contribute to the prevention of misconduct, but they do not have the full deterrent effect of criminal sanctions, nor can they enact such sanctions. The analysis revealed that national jurisdictions are not necessarily capable of prosecuting their own personnel for crimes committed during a PSO due to lack of either substantive law or the fact that provisions are not applicable extraterritorially. Such lacunae could be filled by a state becoming party to a convention on criminal accountability, and executing obligations under the convention. A convention would be legally binding on all state parties, and require them to implement the convention provisions accordingly. In addition, the reporting requisite under the convention would assist enforcement of convention obligations.

Additionally, the Draft Convention deals with the problematic fields of immunity and jurisdiction when seeking accountability. A peace operation is international, resulting in international immunities and jurisdictional complications. Immunity and jurisdiction have been addressed throughout this thesis, particularly in Chapters 3-5, which demonstrated that there are complicated hurdles to overcome. It has been demonstrated that sending states retain jurisdiction over their own nationals whilst engaged in peace operations, however Chapter 4 revealed that there can be no assumption made as to the ability of states to exercise such jurisdiction and assure successful prosecutions for gender-based crimes. Jurisdiction was also shown to be an issue with regards to the ICC, which may have difficulty exercising jurisdiction due to the limiting preconditions to the exercise of jurisdiction in the Rome Statute,¹⁵⁰² as well as issues of admissibility.¹⁵⁰³ Immunity applies to peacekeeping personnel (of all categories, as demonstrated in Appendix 2). While a sending state may exercise criminal jurisdiction over its own nationals without regard to immunity, the position with the ICC has been shown to be more complicated,¹⁵⁰⁴ and it remains to be seen how the ICC will approach the issue of immunity as constructed in SOFAs and MoUs. Whilst the Draft Convention requires a significant amount of revision, provisions relating to immunity and jurisdiction have been shown to

¹⁵⁰² Article 12 Rome Statute.

¹⁵⁰³ Article 17 Rome Statute.

¹⁵⁰⁴ Articles 27 and 98 Rome Statute.

have great potential to enable states to avoid traditional problems of immunity and exercise of jurisdiction.

The main disadvantage, however, of a convention, is that there is no obligation to become a party to a convention, and a convention is only binding on the parties to it. Thus it is crucial that the UN continue to monitor misconduct, and that relevant provisions as discussed in this thesis are always included in MoUs.

Despite the gaps in legislation at national level, national jurisdictions remain the jurisdictions with the potential for the most effective prosecutions of peacekeeping personnel. This has been proven by analysis of the potential of the exercise of jurisdiction at the international level, by examining the capacity of the International Criminal Court as a forum for prosecution. Chapter 5 has proffered the ICC as a valid forum in several ways. Firstly, the Court has relevant substantive law provisions. Secondly, the use of the ICC to prosecute peacekeeping personnel would reveal the seriousness of crimes committed by peacekeepers (in particular the gender-based crimes discussed in this thesis) and act as a highly public deterrent to such behaviour. Lastly, the specific provisions for superior and command responsibility provide an exceptionally valuable category of mode of liability with which to prosecute personnel in a PSO. The importance of accountability of superiors and commanders was demonstrated throughout the thesis through consideration of the unique military community and in particular the structure of a PSO.

However, this analysis found several problematic areas which would create difficulties in the process of prosecution. These include the substantive law- definitions of crimes, in particular the chapeau elements, which require the crime to be part of a widespread or systematic attack on a civilian population (crimes against humanity), or a nexus to armed conflict (war crimes). In addition, immunities and prosecutorial discretion may prove a challenge. Immunity needs to be waived. Subsequently, the Prosecutor should apply his discretion broadly, and not limit his application of the concept of gravity to senior leaders or crimes with a large number of victims. Qualitative factors need

to be applied, such as: impact on victims, their families, and the international community; the nature of the crime; the position of the perpetrator *in that he is a peacekeeper*; and the manner of commission of the crime. Peacekeepers are big fish, and should be viewed as such by the ICC, regardless of official rank.

Whilst the ICC should not be disregarded as a potential forum for prosecution of peacekeepers, the hurdles that require jumping indicate that it will be extremely difficult, and therefore exceptionally improbable that a peacekeeper will ever be prosecuted before the ICC. It is therefore vital to ensure the Draft Convention becomes a full convention, and that states are encouraged to become parties and implement the convention obligations. This will ensure states have adequate laws to prosecute their own personnel involved in PSOs, and that investigations and disciplinary actions to ensure accountability for peacekeepers are conducted with appropriate cooperation and mutual legal assistance instrumental in successful punishment of misconduct. The Member States of the UN and the Secretariat should make certain of continued work on the Draft Convention with the aim of creating an effective international instrument.

This thesis has sought to offer unique commentary on a subject with little prior discussion. It has assisted in filling lacunae of scholarship on accountability of peacekeepers for gender-based crimes against women, in particular in its analysis of the Draft Convention, consideration of the ability of states to prosecute, and the potential difficulties of prosecuting peacekeepers before the ICC. It is hoped that academic debate of these areas will be stimulated, and more so that practical application of suggestions will be carried out. That is, states should strive to proscribe conduct such as sexual exploitation in a manner that guarantees their own peacekeeping personnel can and will be held accountable. This should occur regardless of whether the Draft Convention is adopted or not. The UN should continue, both at Secretariat and Member State (General Assembly and Security Council) levels, to pursue action against personnel accused of criminal conduct. In addition, it will be vital for the UN to cooperate with states and with the ICC in any potential legal proceedings. Again, such cooperation will be assisted by a convention.

The ICC needs to apply a broad definition of concepts such as gravity and war crimes, emphasising the contextual element of crimes, in order not to limit the field of potential perpetrators the Court can prosecute. Peacekeeping personnel should certainly not be automatically excluded from ICC jurisdiction. This thesis has also suggested the addition of a new provision in the Rome Statute. Such an amendment could be discussed at the Rome Statute Review Conference in May-June 2010.¹⁵⁰⁵ In addition, further discussion could be undertaken of the applicability of Article 98, as it remains unclear whether immunities granted in SOFAs will fall within the scope of Article 98.

While the UN has already begun to take action, and some states appear to have extraterritorial application of their laws, few states have reported having the specific substantive law to prosecute crimes such as sexual exploitation.¹⁵⁰⁶ Consequently, it is vital for the UN to remain seized of the issue of criminal accountability and push states to enact such legislation and ensure extraterritorial applicability. States should also seek to utilise the ICC as a potential forum for prosecution should they be unable or unwilling to do so. Comprehensive criminal law at national and international levels will affect accountability for peacekeepers for gender-based crimes against women. Punishment for crimes committed will deter future commission of such crimes, resulting in the reduction of gender-based crimes by peacekeepers. This will create healthy relationships between peacekeepers and the local population, contribute to the success of missions, and crucially, reduce the number of women forced to survive gender-based crimes.

¹⁵⁰⁵ See <http://www.icc-cpi.int/Menus/ASP/ReviewConference/>.

¹⁵⁰⁶ Report of the Secretary-General, Criminal accountability of United Nations officials and experts on mission, A/64/183, 28 July 2009.

Appendices

Appendix 1

1.1. Ten Rules: Code of Personal Conduct for Blue Helmets

1. Dress, think, talk, act and behave in a manner befitting the dignity of a disciplined, caring, considerate, mature, respected and trusted soldier, displaying the highest integrity and impartiality. Have pride in your position as a peace-keeper and do not abuse or misuse your authority.
2. Respect the law of the land of the host country, their local culture, traditions, customs and practices.
3. Treat the inhabitants of the host country with respect, courtesy and consideration. You are there as a guest to help them and in so doing will be welcomed with admiration. Neither solicit nor accept any material reward, honor or gift.
4. Do not indulge in immoral acts of sexual, physical or psychological abuse or exploitation of the local population or United Nations staff, especially women and children.
5. Respect and regard the human rights of all. Support and aid the infirm, sick and weak. Do not act in revenge or with malice, in particular when dealing with prisoners, detainees or people in your custody.
6. Properly care for and account for all United Nations money, vehicles, equipment and property assigned to you and do not trade or barter with them to seek personal benefits.
7. Show military courtesy and pay appropriate compliments to all members of the mission, including other United Nations contingents regardless of their creed, gender, rank or origin.
8. Show respect for and promote the environment, including the flora and fauna, of the host country.
9. Do not engage in excessive consumption of alcohol or any consumption or trafficking of drugs.
10. Exercise the utmost discretion in handling confidential information and matters of official business which can put lives into danger or soil the image of the United Nations.

1.2. We Are United Nations Peacekeeping Personnel

The United Nations Organization embodies the aspirations of all the people of the world for peace.

In this context the United Nations Charter requires that all personnel must maintain the highest standards of integrity and conduct.

We will comply with the Guidelines on International Humanitarian Law for Forces Undertaking United Nations Peacekeeping Operations and the applicable portions of the Universal Declaration of Human Rights as the fundamental basis of our standards.

We, as peacekeeping personnel, represent the United Nations and are present in the country to help it recover from the trauma of a conflict. As a result we must consciously be prepared to accept special constraints in our public and private lives in order to do the work and to pursue the ideals of the United Nations Organization.

We will be accorded certain privileges and immunities arranged through agreements negotiated between the United Nations and the host country solely for the purpose of discharging our peacekeeping duties. Expectations of the world community and the local population will be high and our actions, behaviour and speech will be closely monitored.

We will always:

- Conduct ourselves in a professional and disciplined manner, at all times;
- Dedicate ourselves to achieving the goals of the United Nations;
- Understand the mandate and mission and comply with their provisions;
- Respect the environment of the host country;
- Respect local laws, customs and practices and be aware of and respect culture, religion, traditions and gender issues;
- Treat the inhabitants of the host country with respect, courtesy and consideration;

- Act with impartiality, integrity and tact;
- Support and aid the infirm, sick and weak;
- Obey our United Nations superiors/supervisors and respect the chain of command;
- Respect all other peacekeeping members of the mission regardless of status, rank, ethnic or national origin, race, gender, or creed;
- Support and encourage proper conduct among our fellow peacekeeping personnel;
- Report all acts involving sexual exploitation and abuse;
- Maintain proper dress and personal deportment at all times;
- Properly account for all money and property assigned to us as members of the mission; and
- Care for all United Nations equipment placed in our charge.

We will never:

- Bring discredit upon the United Nations, or our nations through improper personal conduct, failure to perform our duties or abuse of our positions as peacekeeping personnel;
- Take any action that might jeopardize the mission;
- Abuse alcohol, use or traffic in drugs;
- Make unauthorized communications to external agencies, including unauthorized press statements;
- Improperly disclose or use information gained through our employment;
- Use unnecessary violence or threaten anyone in custody;
- Commit any act that could result in physical, sexual or psychological harm or suffering to members of the local population, especially women and children;
- Commit any act involving sexual exploitation and abuse, sexual activity with children under 18, or exchange of money, employment, goods or services for sex;

- Become involved in sexual liaisons which could affect our impartiality, or the well-being of others;
- Be abusive or uncivil to any member of the public;
- Wilfully damage or misuse any United Nations property or equipment;
- Use a vehicle improperly or without authorization;
- Collect unauthorized souvenirs;
- Participate in any illegal activities, corrupt or improper practices; or
- Attempt to use our positions for personal advantage, to make false claims or accept benefits to which we are not entitled.

We realize that the consequences of failure to act within these guidelines may:

- Erode confidence and trust in the United Nations;
- Jeopardize the achievement of the mission;
- Jeopardize our status and security as peacekeeping personnel; and
- Result in administrative, disciplinary or criminal action.

Appendix 2

Table 1 Categories, immunity and jurisdiction of UN peacekeeping personnel

Category of personnel	UN category	National & mission disciplinary authority¹⁵⁰⁷	Immunity	Applicable instruments¹⁵⁰⁸	Criminal jurisdiction
Military personnel	Military (member of national contingent)	<ul style="list-style-type: none"> - National commander - Force Commander 	Absolute immunity	<ul style="list-style-type: none"> - MoU - SOFA - Military Disciplinary Directives 	<ul style="list-style-type: none"> - Sending state - Third state
MilObs	Experts on mission	<ul style="list-style-type: none"> - National commander - Force Commander 	Functional immunity	<ul style="list-style-type: none"> - MoU - SOFA - Draft Convention - General Convention - CivPol Disciplinary Directives 	<ul style="list-style-type: none"> - Host state - Sending state - Third state
Military advisers	Experts on mission	<ul style="list-style-type: none"> - National commander - Force Commander 	Functional immunity	<ul style="list-style-type: none"> - MoU - SOFA - Draft Convention - General Convention 	<ul style="list-style-type: none"> - Host state - Sending state - Third state
Military liaison officers	Experts on mission	<ul style="list-style-type: none"> - National commander - Force Commander 	Functional immunity	<ul style="list-style-type: none"> - MoU - SOFA - Draft Convention - General Convention 	<ul style="list-style-type: none"> - Host state - Sending state - Third state
CivPol	Experts on mission	<ul style="list-style-type: none"> - National commander - Head of UN CivPol 	Functional immunity	<ul style="list-style-type: none"> - SOFA - Draft Convention - General Convention - Disciplinary Directives 	<ul style="list-style-type: none"> - Host state - Sending state - Third state
Formed police units	Experts on mission	<ul style="list-style-type: none"> - National commander - Head of UN CivPol 	Functional immunity	<ul style="list-style-type: none"> - Draft Convention - General Convention 	<ul style="list-style-type: none"> - Host state - Sending state - Third state

¹⁵⁰⁷ Where the mission authority is listed as the Force Commander, this also implies that the ultimate mission authority is the head of mission. However, the purpose of the table is to differentiate who falls under the authority of the Force Commander and who does not.

¹⁵⁰⁸ Applicable instruments listed are: the Memorandum of Understanding (MoU), the Status of Forces Agreement (SOFA), the Convention on the Privileges and Immunities of the United Nations (General Convention), the Draft Convention on the criminal accountability of UN officials and experts on mission (Draft Convention), Directives for Disciplinary Matters Involving Military Members of National Contingents (Military Disciplinary Directives), and Directives for Disciplinary Matters Involving Civilian Police Officers and Military Observers (CivPol Disciplinary Directives).

Civilian personnel	Experts on mission	- Head of mission	Functional immunity	- SOFA - Draft Convention	- Host state - Sending state/ state of nationality - Third state
Very senior UN officials	Official	- Head of mission	Absolute Immunity	- General convention - Draft Convention	- Possibly third state
UN staff	Officials	- Head of mission	Functional immunity	- SOFA - Draft Convention - General Convention	- Host state - Third state
UNVs	Officials	- Head of mission	Functional immunity	- Draft Convention - General Convention	- Host state - State of nationality - Third state
Consultants and individual contractors	Experts on mission ONLY if required to travel on behalf of UN	- Subject to local law - Head of mission?	Functional immunity	- Contracts	- Host state - State of nationality

Appendix 3

Criminal Code Act (Cth) 1995 (Australia)

Chapter 2 General principles of criminal responsibility

Part 2.7 Geographical jurisdiction

Division 15—Extended geographical jurisdiction

15.1 Extended geographical jurisdiction—category A

(1) If a law of the Commonwealth provides that this section applies to a particular offence, a person does not commit the offence unless:

(a) the conduct constituting the alleged offence occurs:

(i) wholly or partly in Australia; or

(ii) wholly or partly on board an Australian aircraft or an Australian ship; or

(b) the conduct constituting the alleged offence occurs wholly outside Australia and a result of the conduct occurs:

(i) wholly or partly in Australia; or

(ii) wholly or partly on board an Australian aircraft or an Australian ship; or

(c) the conduct constituting the alleged offence occurs wholly outside Australia and:

(i) at the time of the alleged offence, the person is an Australian citizen; or

(ii) at the time of the alleged offence, the person is a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; or

(d) all of the following conditions are satisfied:

(i) the alleged offence is an ancillary offence;

(ii) the conduct constituting the alleged offence occurs wholly outside Australia;

(iii) the conduct constituting the primary offence to which the ancillary offence relates, or a result of that conduct, occurs, or is intended by the person to occur, wholly or partly in Australia or wholly or partly on board an Australian aircraft or an Australian ship.

Note: The expression offence is given an extended meaning by subsection 11.2(1), section 11.3 and subsection 11.6(1).

Defence—primary offence

(2) If a law of the Commonwealth provides that this section applies to a particular offence, a person is not guilty of the offence if:

(aa) the alleged offence is a primary offence; and

(a) the conduct constituting the alleged offence occurs wholly in a foreign country, but not on board an Australian aircraft or an Australian ship; and

(b) the person is neither:

(i) an Australian citizen; nor

(ii) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; and

(c) there is not in force in:

(i) the foreign country where the conduct constituting the alleged offence occurs; or

(ii) the part of the foreign country where the conduct constituting the alleged offence occurs; a law of that foreign country, or a law of that part of that foreign country, that creates an offence that corresponds to the first-mentioned offence.

Note: A defendant bears an evidential burden in relation to the matters in subsection (2). See subsection 13.3(3).

(3) For the purposes of the application of subsection 13.3(3) to an offence, subsection (2) of this section is taken to be an exception provided by the law creating the offence.

Defence—ancillary offence

(4) If a law of the Commonwealth provides that this section applies to a particular offence, a person is not guilty of the offence if:

(a) the alleged offence is an ancillary offence; and

(b) the conduct constituting the alleged offence occurs wholly in a foreign country, but not on board an Australian aircraft or an Australian ship; and

(c) the conduct constituting the primary offence to which the ancillary offence relates, or a result of that conduct, occurs, or is intended by the person to occur, wholly in a foreign country, but not on board an Australian aircraft or an Australian ship; and

(d) the person is neither:

(i) an Australian citizen; nor

(ii) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; and

(e) there is not in force in:

(i) the foreign country where the conduct constituting the primary offence to which the ancillary offence relates, or a result of that conduct, occurs, or is intended by the person to occur; or

(ii) the part of the foreign country where the conduct constituting the primary offence to which the ancillary offence relates, or a result of that conduct, occurs, or is intended by the person to occur; a law of that foreign country, or a law of that part of that foreign country, that creates an offence that corresponds to the primary offence.

Note: A defendant bears an evidential burden in relation to the matters in subsection (4). See subsection 13.3(3).

(5) For the purposes of the application of subsection 13.3(3) to an offence, subsection (4) of this section is taken to be an exception provided by the law creating the offence.

15.2 Extended geographical jurisdiction—category B

(1) If a law of the Commonwealth provides that this section applies to a particular offence, a person does not commit the offence unless:

(a) the conduct constituting the alleged offence occurs:

(i) wholly or partly in Australia; or

(ii) wholly or partly on board an Australian aircraft or an Australian ship; or

(b) the conduct constituting the alleged offence occurs wholly outside Australia and a result of the conduct occurs:

(i) wholly or partly in Australia; or

(ii) wholly or partly on board an Australian aircraft or an Australian ship; or

(c) the conduct constituting the alleged offence occurs wholly outside Australia and:

(i) at the time of the alleged offence, the person is an Australian citizen; or

(ii) at the time of the alleged offence, the person is a resident of Australia; or

(iii) at the time of the alleged offence, the person is a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; or

(d) all of the following conditions are satisfied:

(i) the alleged offence is an ancillary offence;

(ii) the conduct constituting the alleged offence occurs wholly outside Australia;

(iii) the conduct constituting the primary offence to which the ancillary offence relates, or a result of that conduct, occurs, or is intended by the person to occur, wholly or partly in Australia or wholly or partly on board an Australian aircraft or an Australian ship.

Note: The expression offence is given an extended meaning by subsection

11.2(1), section 11.3 and subsection 11.6(1).

Defence—primary offence

(2) If a law of the Commonwealth provides that this section applies to a particular offence, a person is not guilty of the offence if:

(aa) the alleged offence is a primary offence; and

(a) the conduct constituting the alleged offence occurs wholly in a foreign country, but not on board an Australian aircraft or an Australian ship; and

(b) the person is neither:

(i) an Australian citizen; nor

(ii) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; and

(c) there is not in force in:

(i) the foreign country where the conduct constituting the alleged offence occurs; or

(ii) the part of the foreign country where the conduct constituting the alleged offence occurs; a law of that foreign country, or a law of that part of that foreign country, that creates an offence that corresponds to the first-mentioned offence.

Note: A defendant bears an evidential burden in relation to the matters in subsection (2). See subsection 13.3(3).

(3) For the purposes of the application of subsection 13.3(3) to an offence, subsection (2) of this section is taken to be an exception provided by the law creating the offence.

Defence—ancillary offence

(4) If a law of the Commonwealth provides that this section applies to a particular offence, a person is not guilty of the offence if:

(a) the alleged offence is an ancillary offence; and

(b) the conduct constituting the alleged offence occurs wholly in a foreign country, but not on board an Australian aircraft or an Australian ship; and (c) the conduct constituting the primary offence to which the ancillary offence relates, or a result of that conduct, occurs, or is intended by the person to occur, wholly in a foreign country, but not on board an Australian aircraft or an Australian ship; and

(d) the person is neither:

(i) an Australian citizen; nor

(ii) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; and

(e) there is not in force in:

(i) the foreign country where the conduct constituting the primary offence to which the ancillary offence relates, or a result of that conduct, occurs, or is intended by the person to occur; or

(ii) the part of the foreign country where the conduct constituting the primary offence to which the ancillary offence relates, or a result of that conduct, occurs, or is intended by the person to occur; a law of that foreign country, or a law of that part of that foreign country, that creates an offence that corresponds to the primary offence.

Note: A defendant bears an evidential burden in relation to the matters in subsection (4). See subsection 13.3(3).

(5) For the purposes of the application of subsection 13.3(3) to an offence, subsection (4) of this section is taken to be an exception provided by the law creating the offence.

15.3 Extended geographical jurisdiction—category C

(1) If a law of the Commonwealth provides that this section applies to a particular offence, the offence applies:

(a) whether or not the conduct constituting the alleged offence occurs in Australia; and

(b) whether or not a result of the conduct constituting the alleged offence occurs in Australia.

Note: The expression offence is given an extended meaning by subsection 11.2(1), section 11.3 and subsection 11.6(1).

Defence—primary offence

(2) If a law of the Commonwealth provides that this section applies to a particular offence, a person is not guilty of the offence if:

(aa) the alleged offence is a primary offence; and

(a) the conduct constituting the alleged offence occurs wholly in a foreign country, but not on board an Australian aircraft or an Australian ship; and

(b) the person is neither:

(i) an Australian citizen; nor

(ii) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory;
and

(c) there is not in force in:

(i) the foreign country where the conduct constituting the alleged offence occurs; or

(ii) the part of the foreign country where the conduct constituting the alleged offence occurs; a law of that foreign country, or that part of that foreign country, that creates an offence that corresponds to the first-mentioned offence.

Note: A defendant bears an evidential burden in relation to the matters in subsection (2). See subsection 13.3(3).

(3) For the purposes of the application of subsection 13.3(3) to an offence, subsection (2) of this section is taken to be an exception provided by the law creating the offence.

Defence—ancillary offence

(4) If a law of the Commonwealth provides that this section applies to a particular offence, a person is not guilty of the offence if:

(a) the alleged offence is an ancillary offence; and

(b) the conduct constituting the alleged offence occurs wholly in a foreign country, but not on board an Australian aircraft or an Australian ship; and

(c) the conduct constituting the primary offence to which the ancillary offence relates, or a result of that conduct, occurs, or is intended by the person to occur, wholly in a foreign country, but not on board an Australian aircraft or an Australian ship; and

(d) the person is neither:

(i) an Australian citizen; nor

(ii) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; and

(e) there is not in force in:

(i) the foreign country where the conduct constituting the primary offence to which the ancillary offence relates, or a result of that conduct, occurs, or is intended by the person to occur; or

(ii) the part of the foreign country where the conduct constituting the primary offence to which the ancillary offence relates, or a result of that conduct, occurs, or is intended by the person to occur; a law of that foreign country, or a law of that part of that foreign country, that creates an offence that corresponds to the primary offence.

Note: A defendant bears an evidential burden in relation to the matters in subsection (4). See subsection 13.3(3).

(5) For the purposes of the application of subsection 13.3(3) to an offence, subsection (4) of this section is taken to be an exception provided by the law creating the offence.

15.4 Extended geographical jurisdiction—category D

If a law of the Commonwealth provides that this section applies to a particular offence, the offence applies:

- (a) whether or not the conduct constituting the alleged offence occurs in Australia; and
- (b) whether or not a result of the conduct constituting the alleged offence occurs in Australia.

Note: The expression offence is given an extended meaning by subsection 11.2(1), section 11.3 and subsection 11.6(1).

Bibliography

Gender Resource Package for Peacekeeping Operations, (United Nations Department of Peacekeeping Operations, New York 2004).

Allwood, Gill, *French Feminisms: Gender and violence in contemporary theory*, (UCL Press Limited, London 1998).

Arbuckle, James V., *Military Forces in 21st Century Peace Operations: No job for a soldier?*, (Routledge, Oxon 2006).

Askin, Kelly D., *War Crimes Against Women: Prosecution in International War Crimes Tribunals*, (Martinus Nijhoff Publishers, The Hague 1997).

Aust, Anthony, *Modern Treaty Law and Practice*, 2nd ed., (Cambridge University Press, Cambridge 2007).

Bassiouni, M. Cherif, *Introduction to International Criminal Law*, (Transnational Publishers, Inc., Ardsley, New York 2003).

Blackett, Jeff, *Rant on the Court Martial and Service Law*, 3rd ed., (Oxford University Press, Oxford 2009).

Broomhall, Bruce, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*, 2nd ed., (Oxford University Press, Oxford 2003).

Brownlie, Ian, *Principles of Public International Law*, 7th ed., (Oxford University Press, Oxford 2008).

Burgess-Jackson, Keith, *Rape: A Philosophical Investigation*, (Dartmouth, Aldershot 1996).

Carney, Gerard, *The constitutional systems of the Australian states and territories*, (Cambridge University Press, Cambridge 2006).

Cassese, Antonio, *International Criminal Law*, 2nd ed., (Oxford University Press, Oxford 2008).

Charlesworth, Hilary and Chinkin, Christine, *The Boundaries of International Law: A Feminist Analysis*, (Manchester University Press, Manchester 2000).

Craig, Paul and De Burca, Grainne, *EU Law: Texts, Cases and Materials*, 3rd ed., (Oxford University Press, Oxford 2002).

Cryer, Robert, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, (Cambridge University Press, Cambridge 2005).

Cryer, Robert, et al., *An Introduction to International Criminal Law and Procedure*, (Cambridge University Press, Cambridge 2007).

Dallaire, Romeo, *Shake Hands With the Devil*, (Arrow Books, London 2003).

Davidson, Michael J., *A Guide to Military Criminal Law*, (Naval Institute Press, Annapolis, Maryland 1999).

Dinstein, Yoram, *The Conduct of Hostilities Under the Law of International Armed Conflict*, 2nd ed., (Cambridge University Press, Cambridge 2010).

Dixon, Martin and McCorquodale, Robert, *Cases And Materials On International Law*, 4th ed., (Oxford University Press, Oxford 2003).

Dörmann, Knut, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, (Cambridge University Press, Cambridge 2002).

Dressler, Joshua, *Understanding Criminal Law*, 3rd ed., (Lexis Publishing, New York 2001).

Drumbl, Mark A., *Atrocity, Punishment, and International Law*, (Cambridge University Press, Cambridge 2007).

Enloe, Cynthia, *Does Khaki Become You? The Militarization of Women's Lives*, First ed., (South End Press, London 1983).

Farnsworth, E. Allan, *An Introduction to the Legal System of the United States*, (Oceana Publications, Dobbs Ferry NY 1996).

Feinberg, Joel, *Harm to Others: The Moral Limits of the Criminal Law*, Vol. 1, (Oxford University Press, New York, Oxford 1984).

Feinberg, Joel, *Offense to Others: The Moral Limits of the Criminal Law*, Vol. 2, (Oxford University Press, New York, Oxford 1985).

Feinberg, Joel, *Harm to Self: The Moral Limits of the Criminal Law*, Vol. 3, (Oxford University Press, New York, Oxford 1986).

Feinberg, Joel, *Harmless Wrongdoing: The Moral Limits of the Criminal Law*, Vol. 4, (Oxford University Press, New York, Oxford 1988).

Findlay, Mark, *Criminal Law: Problems in Context*, 2nd ed., (Oxford University Press, South Melbourne 2006).

Fox, Hazel, *The Law of State Immunity*, 2nd ed., (Oxford University Press, Oxford 2008).

Gardam, Judith and Jarvis, Michelle, *Women, Armed Conflict and International Law*, (Kluwer Law International, The Hague 2001).

Gilligan, Francis A. and Lederer, Frederic I., *Court-Martial Procedure*, 2nd ed., Vol. 1, (Lexis Law Publishing, Charlottesville, Virginia 1999).

Godwin, John, et al., *Australian HIV/AIDS Legal Guide*, 2nd ed., (The Federation Press, Leichhardt 1993).

Goldstein, Joshua S., *War and Gender: How Gender Shapes the War System and Vice Versa*, (Cambridge University Press, Cambridge 2001).

Gross, Hyman, *A Theory of Criminal Justice*, (Oxford University Press, New York 1979).

Harris, DJ, *Cases and Materials on International Law*, 6th ed., (Sweet & Maxwell, London 2004).

Henckaerts, Jean-Marie and Doswald-Beck, Louise, *Customary International Humanitarian Law Volume I: Rules*, (Cambridge University Press, Cambridge 2005).

Herring, Jonathan, *Criminal Law*, 3rd ed., (Oxford University Press, Oxford 2008).

Katayanagi, Mari, *Human Rights Functions of United Nations Peacekeeping Operations*, (Martinus Nijhoff Publishers, The Hague 2002).

Kelly, Major Michael J., *Peace Operations: Tackling the Military Legal and Policy Challenges*, (Australian Government Publishing Service, Canberra 1997).

Kelly, Michael J., *Restoring and Maintaining Order in Complex Peace Operations: The Search for a Legal Framework* (Martinus Nijhoff Publishers, The Hague 1999).

Kleffner, Jann K., *Complementarity in the Rome Statute and National Criminal Jurisdictions*, (Oxford University Press, Oxford 2008).

Le Blanc, Lawrence J., *The United States and the Genocide Convention*, (Duke University Press, Durham 1991).

MacKinnon, Catharine A., *Feminism Unmodified*, (Harvard University Press, Cambridge, Mass., London 1987).

MacKinnon, Catharine A., *Are Women Human? And Other International Dialogues*, (Belknap Press, Cambridge, Mass., London 2006).

Marshall, Catherine, et al., *Militarism versus Feminism: Writings on Women and War*, (Virago Press Limited, London 1987).

May, Larry, *Crimes Against Humanity: A Normative Account*, (Cambridge University Press, Cambridge 2005).

McCoubrey, Hilaire and White, Nigel D., *The Blue Helmets: Legal Regulation of United Nations Military Operations*, (Dartmouth Publishing Company Limited, Aldershot 1996).

Melzer, Nils, *Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law*, (International Committee of the Red Cross, Geneva 2009).

Mettraux, Guénaél, *The Law of Command Responsibility*, (Oxford University Press, Oxford 2009).

Moon, Katharine H. S., *Sex among Allies: Military Prostitution in U.S.-Korea Relations*, (Columbia University Press, New York 1997).

Persak, Nina, *Criminalising Harmful Conduct: The Harm Principle, its Limits and Continental Counterparts*, (Springer, New York 2007).

Quénivet, Noëlle N.R., *Sexual Offenses in Armed Conflict & International Law*, (Transnational Publishers, Inc., Ardsley, New York 2005).

Rowe, Peter, *The Impact of Human Rights Law on Armed Forces*, (Cambridge University Press, Cambridge 2006).

Sadat, Leila Nadya, *The International Criminal Court and the Transformation of International Law*, (Transnational Publishers, Inc., Ardsley, New York 2002).

Sassoli, Marco and Bouvier, Antoine A., *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, (International Committee of the Red Cross, Geneva 1999).

Schabas, William A., *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone*, (Cambridge University Press, Cambridge 2006).

Schabas, William A., *An Introduction to the International Criminal Court*, 3rd ed., (Cambridge University Press, Cambridge 2007).

Schlueter, David A., *Military Criminal Justice: Practice and Procedure*, 6th ed., (LexisNexis, 2004).

Schonsheck, Jonathan, *On Criminalization: An Essay in the Philosophy of the Criminal Law*, Vol. 19, (Kluwer Academic Publishers, Dordrecht/Boston/London 1994).

Shaw, Malcolm N., *International Law*, 6th ed., (Cambridge University Press, Cambridge 2008).

Simester, A.P. and Sullivan, G.R., *Criminal Law : Theory and Doctrine*, 3rd ed., (Hart, Oxford 2007).

Sturdevant, Sandra Pollock and Stoltzfus, Brenda, *Let the Good Times Roll: Prostitution and the U.S. Military in Asia*, (The New Press, New York 1992).

Van Alebeek, Rosanne, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, (Oxford University Press, Oxford 2008).

Werle, Gerhard, *Principles of International Criminal Law*, 2nd ed., (T.M.C. Asser Press, The Hague 2009).

Whitworth, Sandra, *Men, Militarism, and UN Peacekeeping*, (Lynne Rienner Publishers, London 2004).

Williams, Christine L., *Gender Differences at Work: Women and Men in Nontraditional Occupations*, (University of California Press, Berkeley 1989).

Wilson, William, *Central Issues in Criminal Theory*, (Hart Publishing, Oxford-Portland Oregon 2002).

Zalewski, Marysia, *Feminism after Postmodernism: Theorising Through Practice*, (Routledge, Florence, KY, USA 2000).

Zwanenburg, Marten, *Accountability of Peace Support Operations*, Vol. 9, (Martinus Nijhoff Publishers, Leiden 2005).

Aceves, William J. and Hoffman, Paul L., 'Pursuing Crimes Against Humanity in the United States: The Need for a Comprehensive Liability Regime', in M. Lattimer and P. Sands (eds.), *Justice for Crimes Against Humanity*, (Hart Publishing, Oxford and Portland, Oregon 2003), 239-269.

Ambos, Kai, 'Individual Criminal Responsibility in International Criminal Law: A Jurisprudential Analysis- From Nuremberg to the Hague', in G. Kirk McDonald and O. Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts*, (Kluwer Law International, The Hague 2000).

Ambos, Kai, 'Superior Responsibility', in A. Cassese, et al. (eds.), *The Rome Statute of the International Criminal Court*, Vol. I, (Oxford University Press, Oxford 2002), 823-872.

Askin, Kelly D., 'Women's Issues in International Criminal Law: Recent Developments and the Potential Contribution of the ICC', in D. Shelton (ed.), *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court*, (Transnational Publishers, Inc., Ardsley, New York 2000), 47-63.

Bolin Pennegård, Ann-Marie, 'Article 5', in G. Alfredsson and A. Eide (eds.), *The Universal Declaration of Human Rights*, (Martinus Nijhoff Publishers, The Hague 1999), 121-146.

Boot, Machteld and Hall, Christopher K., 'Article 7 Crimes against humanity para. 1 (g)', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., (C.H. Beck, Hart, Nomos, Muenchen, Oxford, Baden-Baden 2008), 206-216.

Bothe, Michael, 'War Crimes', in A. Cassese, et al. (eds.), *The Rome Statute of the International Criminal Court*, Vol. I, (Oxford University Press, Oxford 2002), 379-426.

Cassel, Douglass, 'Extraterritorial Application of Inter-American Human Rights Instruments', in F. Coomans and M. T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*, (Intersentia, Antwerp & Oxford 2004), 175-182.

Cassese, Antonio, 'Crimes against Humanity', in A. Cassese, et al. (eds.), *The Rome Statute of the International Criminal Court*, Vol. I, (Oxford University Press, Oxford 2002), 353-378.

Cassese, Antonio, 'Genocide', in A. Cassese, et al. (eds.), *The Rome Statute of the International Criminal Court*, (Oxford University Press, Oxford 2002), 335-352.

Cottier, Michael, 'Article 8 War crimes para. 2(b)(xxii)', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., (C.H. Beck, Hart, Nomos, Muenchen, Oxford, Baden-Baden 2008).

Cryer, Robert, 'General Principles of Liability in International Criminal Law', in D. McGoldrick, et al. (eds.), *The Permanent International Criminal Court*, (Hart Publishing, Oxford and Portland Oregon 2004), 233-262.

Dixon, Rodney and Hall, Christopher K., 'Crimes against humanity- chapeau', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., (C.H. Beck, Hart, Nomos, Muenchen, Oxford, Baden-Baden 2008).

Dörmann, Knut, et al., 'The Context of War Crimes', in R. S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, (Transnational Publishers, Inc., Ardsley, NY 2001), 112-123.

Drumbl, Mark A., 'A Hard Look at the Soft Theory of International Criminal Law', in L. N. Sadat and M. P. Scharf (eds.), *The Theory and Practice of International Law*, (Martinus Nijhoff Publishers, Leiden 2008), 1-18.

Eser, Albin, 'Individual Criminal Responsibility', in A. Cassese, et al. (eds.), *The Rome Statute of the International Criminal Court*, Vol. I, (Oxford University Press, Oxford 2002), 767-822.

Gaeta, Paola, 'Official Capacity and Immunities', in A. Cassese, et al. (eds.), *The Rome Statute of the International Criminal Court*, Vol. I, (Oxford University Press, Oxford 2002), 975-1002.

Gillard, Emanuela-Chiara, 'International Humanitarian Law and Extraterritorial State Conduct', in F. Coomans and M. T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*, (Intersentia, Antwerp & Oxford 2004), 25-40.

Gut, Till and Wolpert, Max, 'Prosecution of International Crimes in Canada', in A. Eser, et al. (eds.), *National Prosecution of International Crimes [Nationale Strafverfolgung völkerrechtlicher Verbrechen]*, (Duncker & Humblot, Berlin 2005).

Heller, Kevin Jon, 'Situational Gravity under the Rome Statute', in C. Stahn and L. von den Herik (eds.), *Future Perspectives in International Criminal Justice*, (TMC Asser Press, The Hague 2010), 227-253.

Henquet, Thomas, 'Accountability for Arrests: The Relationship between the ICTY and NATO's NAC and SFOR', in G. Boas and W. A. Schabas (eds.), *International Criminal Law Developments in the Case Law of the ICTY*, (Brill, Leiden 2003), 113-155.

Higate, Paul, 'Revealing the soldier: Peacekeeping and prostitution', in G. Herdt and C. Howe (eds.), *21st Century Sexualities*, (Routledge, 2007), 198-202.

Holmes, John T., 'Complementarity: National Courts versus the ICC', in A. Cassese, et al. (eds.), *The Rome Statute of the International Criminal Court*, Vol. I, (Oxford University Press, Oxford 2002), 667-686.

Husak, Douglas N., 'Limitations on Criminalization and the General Part of Criminal Law', in S. Shute and A. P. Simester (eds.), *Criminal Law Theory: Doctrines of the General Part*, (Oxford University Press, Oxford 2002).

Karns, Margaret P. and Mingst, Karen A., 'Peacekeeping and the changing role of the United Nations: Four dilemmas', in R. Thakur and A. Schnabel (eds.), *United Nations peacekeeping operations: Ad hoc missions, permanent engagement*, (United Nations University Press, Tokyo, New York, Paris 2001), 215-237.

Kaul, Hans-Peter, 'Preconditions to the Exercise of Jurisdiction', in A. Cassese, et al. (eds.), *The Rome Statute of the International Criminal Court*, Vol. I, (Oxford University Press, Oxford 2002), 583-618.

Kent, Vanessa, 'Protecting civilians from UN peacekeepers and humanitarian workers: Sexual exploitation and abuse', in C. Aoi, et al. (eds.), *Unintended Consequences of Peacekeeping*, (United Nations University Press, Tokyo, New York, Paris 2007), 44-66.

Klappe, Ben F., 'International Peace Operations', in D. Fleck (ed.), *The Handbook of International Humanitarian Law*, 2nd ed., (Oxford University Press, Oxford 2008), 635-673.

Koyama, Shukuko and Myrtilinen, Henri, 'Unintended consequences of peace operations on Timor Leste from a gender perspective', in C. Aoi, et al. (eds.), *Unintended Consequences of Peacekeeping Operations*, (United Nations University Press, Tokyo, New York, Paris 2007), 23-43.

Kress, Claus and Prost, Kimberly, 'Article 98 Cooperation with respect to waiver of immunity and consent to surrender', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., (C.H.Beck, Hart, Nomos, Muenchen, Oxford, Baden-Baden 2008).

La Haye, Eva, 'Article 8(2)(b)(xxii)', in R. S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, (Transnational Publishers, Inc., Ardsley, NY 2001), 187-198.

Lawson, Rick, 'Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights', in F. Coomans and M. T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*, (Intersentia, Antwerp & Oxford 2004), 83-124.

Meron, Theodor, 'Crimes Under the Jurisdiction of the International Criminal Court', in H. Von Hebel, et al. (eds.), *Reflections on the International Criminal Court*, (TMC Asser Press, The Hague 1999), 47-55.

Morris, Madeline, 'High Crimes and Misconceptions: The ICC and Non-Party States', in D. Shelton (ed.), *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court*, (Transnational Publishers, Inc., Ardsley, New York 2000), 219-279.

Nelken, David, 'Doing Research Into Comparative Criminal Justice', in R. Banakar and M. Travers (eds.), *Theory and Method in Socio-Legal Research*, (Hart Publishing, Oxford, Portland Oregon 2005), 245-258.

O'Brien, Melanie, 'Issues of the Draft Convention on the Criminal Accountability of United Nations Officials and Experts on Mission', in N. Quénivet and S. Shah-Davis (eds.), *International Law and Armed Conflict: Challenges in the 21st Century*, (TMC Asser Press, The Hague 2010), 57-75.

Otto, Dianne, 'Making sense of zero tolerance policies in peacekeeping sexual economies', in V. Munro and C. F. Stychin (eds.), *Sexuality and the Law: Feminist Engagements*, (Glasshouse Press, London 2007), 259-282.

Petrovic, Jadranka, 'Cultural Context of Peace Operations', in J. Howard and B. Oswald (eds.), *The Rule of Law on Peace Operations*, (Asia-Pacific Centre for Military Law, Melbourne 2002), 213-221.

Power, Samantha, 'The United States and Genocide Law: A History of Ambivalence', in S. B. Sewell and C. Kaysen (eds.), *The United States and the International Criminal Court*, (Rowman & Littlefield Publishers, New York 2000).

Robinson, Darryl, 'The Context of Crimes Against Humanity', in R. S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, (Transnational Publishers, Inc., Ardsley, NY 2001), 61-79.

Rowe, Peter, 'War Crimes', in D. McGoldrick, et al. (eds.), *The Permanent International Criminal Court*, (Hart Publishing, Oxford and Portland Oregon 2004), 203-230.

Schabas, William A., 'Article 6 Genocide', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., (C.H. Beck, Hart, Nomos, Muenchen, Oxford, Baden-Baden 2008).

Scheinin, Martin, 'Extraterritorial Effect of the International Covenant on Civil and Political Rights', in F. Coomans and M. T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*, (Intersentia, Antwerp & Oxford 2004), 73-82.

Schnabel, Albrecht and Thakur, Ramesh, 'From An Agenda for Peace to the Brahimi Report: Towards a new era of UN peace operations?', in R. Thakur and A. Schnabel (eds.), *United Nations peacekeeping operations: Ad hoc mission, permanent engagement*, (United Nations University Press, Tokyo, New York, Paris 2001), 238-255.

Silverman, Emily, 'Prosecution of International Crimes in the United States of America', in A. Eser, et al. (eds.), *National Prosecution of International Crimes [Nationale Strafverfolgung völkerrechtlicher Verbrechen]*, (Duncker & Humblot, Berlin 2005).

Slade, Tuiloma Neroni and Clark, Roger S., 'Preamble and Final Clauses', in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, (Kluwer Law International, The Hague 2002), 421-450.

Steains, Cate, 'Gender Issues', in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, (Kluwer Law International, The Hague 1999), 357-390.

Stern, Brigitte and Fouchard, Isabell, 'Sexual Violence as Genocide', in L. N. Sadat and M. P. Scharf (eds.), *The Theory and Practice of International Criminal Law*, (Martinus Nijhoff Publishers, Leiden 2008), 285-308.

Swart, Bert, 'Modes of International Criminal Liability', in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice*, (Oxford University Press, Oxford 2009), 82-93.

Triffterer, Otto, 'Preliminary Remarks: The Permanent International Criminal Court- Ideal and Reality', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., (C.H. Beck, Hart, Nomos, Muenchen, Oxford, Baden-Baden 2008).

Triffterer, Otto and Arnold, Roberta, 'Article 28 Responsibility of commanders and other superiors', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., (C.H. Beck, Hart, Nomos, Muenchen, Oxford, Baden-Baden 2008).

Turone, Giuliano, 'Powers and Duties of the Prosecutor', in A. Cassese, et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary Volume II*, (Oxford University Press, Oxford 2002), 1137-1180.

von Hebel, Herman and Robinson, Darryl, 'Crimes within the Jurisdiction of the Court', in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, (Kluwer Law International, The Hague 1999), 79-126.

von Hirsch, Andrew, 'Extending the Harm Principle: 'Remote' Harms and Fair Imputation', in A. P. Simester and A. T. H. Smith (eds.), *Harm and Culpability*, (Clarendon Press, Oxford 1996), 259-276.

Williams, Sharon A. and Schabas, William A., 'Article 12 Precondition to the exercise of jurisdiction', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., (C.H.Beck, Hart, Nomos, Muenchen, Oxford, Baden-Baden 2008), 547-561.

Williams, Sharon A. and Schabas, William A., 'Article 17 Issues of Admissibility', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., (C.H. Beck, Hart, Nomos, Muenchen, Oxford, Baden-Baden 2008), 605-625.

Zimmerman, Andreas, 'Preliminary Remarks on para. 2 (c)-(f) and para. 3: War crimes committed in an armed conflict not of an international character', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., (C.H. Beck, Hart, Nomos, Muenchen, Oxford, Baden-Baden 2008), 475-504.

Rastan, Rod, The Power of the Prosecutor in Initiating Investigations, *Symposium on the International Criminal Court*, (Beijing, China 2007).

Bassiouni, M. Cherif (ed.), *International Criminal Law Volume I Crimes*, (Transnational Publishers, Inc., Ardsley, New York 1999).

Bassiouni, M. Cherif (ed.), *International Criminal Law Volume II Procedural and Enforcement Mechanisms*, 2nd ed., (Transnational Publishers, Inc., Ardsley, New York 1999).

Cassese, Antonio, et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary Volume II*, (Oxford University Press, Oxford 2002).

Coomans, Fons and Kamminga, Menno T. (eds.), *Extraterritorial Application of Human Rights Treaties*, (Intersentia, Antwerp-Oxford 2004).

Faite, Alexandre and Grenier, Jeremie Labbe (eds.), *Expert Meeting on Multinational Peace Operations: Applicability of International Humanitarian Law and International Human Rights Law to UN Mandated Forces*, (International Committee of the Red Cross, Geneva 2004).

Higate, Paul (ed.), *Military Masculinities: Identity and the State*, (Praeger, Westport CT 2003).

Meessen, Karl M. (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, (Kluwer Law International, London 1996).

Stiglsmayer, Alexandra (ed.), *Mass Rape: The War against Women in Bosnia-Herzegovina*, (University of Nebraska Press, Lincoln and London 1994).

'Africa-Asia: Gender-based violence: A silent, vicious epidemic', *IRIN NEWS*, (1 September 2004).

Erichsen, Olaf Wilhelm, 'CHOD's Code of Conduct for Norwegian personnel serving abroad', *Forsvarets Skolesenter*, (2006).

Mill, John Stuart, *On Liberty*, (ElecBook, London 2001 (orig. 1859))

Subcommittee on International Operations and Human Rights of the Committee on International Relations, Second Session, 'The U.N. and the Sex Slave Trade in Bosnia: Isolated Case or Larger Problem in the U.N. System?' (U.S. Government Printing Office, Washington D.C., 24 April 2002) Document No. 107-85

'American Servicemembers' Protection Act' (2002) 96 (4) *American Journal of International Law* 975-977.

'Efforts to Obtain Immunity from ICC for U.S. Peacekeepers' (2002) 96 (3) *American Journal of International Law* 725-729.

'Application of international humanitarian law and international human rights law to UN-mandated forces: Report on the Expert meeting on multinational peace operations' (2004) 86 (853) *International Review of the Red Cross* 207-212.

Akande, Dapo, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1 *Journal of International Criminal Justice* 618-650.

Alison, Miranda, 'Wartime sexual violence: women's human rights and questions of masculinity' (2007) 33 *Review of International Studies* 75-90.

Allred, Keith J., 'Human Trafficking: Breaking the Military Link' (2005) IV (4) *The Quarterly Journal* 64-72.

Allred, Keith J., 'Peacekeepers and Prostitutes: How Deployed Forces Fuel the Demand for Trafficked Women and New Hope for Stopping It' (2006) 33 (1) *Armed Forces & Society* 5-23.

Altiparmak, Kerem, 'Bankovic: An Obstacle to the Application of the European Convention on Human Rights in Iraq?' (2004) 9 (2) *Journal of Conflict and Security Law* 213-251.

Altıparmak, Kerem, 'European Convention on Human Rights: Extra-territorial Application' (2005) 69 *Journal of Criminal Law* 295-301.

Amerasinghe, C. F., 'The Bosnia Genocide Case' (2008) 21 *Leiden Journal of International Law* 411-428.

Askin, Kelly D., 'The International War Crimes Trial of Anto Furundzija: Major Progress Toward Ending the Cycle of Impunity for Rape Crimes' (1999) 12 *Leiden Journal of International Law* 935-955.

Askin, Kelly D., 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles' (2003) 21 *Berkeley Journal of International Law* 288-316.

Aust, Anthony, 'The Theory and Practice of Informal International Instruments' (1986) 35 *International and Comparative Law Quarterly* 787-812.

Baldwin, Margaret A., 'A Date with Justice: Prostitution and the Decriminalization Debate' (1993-1994) 1 *Cardozo Women's Law Journal* 125-131.

Bassiouni, M. Cherif, 'International Recognition of Victims' Rights' (2006) 6 (2) *Human Rights Law Review* 203-279.

Bernstein, Elizabeth, 'What's Wrong with Prostitution? What's Right with Sex Work? Comparing Market in Female Sexual Labor' (1999) 10 *Hastings Women's Law Journal* 91-117.

Bialke, Major Joseph P., 'United Nations Peace Operations: Applicable Norms and the Application of the Law of Armed Conflict' (2001) 50 *A.F.L. Rev.* 1-63.

Bonafé, Beatrice I., 'Finding a proper role for command responsibility' (2007) 5 (3) *Journal of International Criminal Justice* 599-618.

Bourloyannis-Vrailas, M.-Christiane, 'The Convention on the Safety of United Nations and Associated Personnel' (1995) 44 *International and Comparative Law Quarterly* 560-590.

Brubacher, Matthew R., 'Prosecutorial Discretion within the International Criminal Court' (2004) 2 *Journal of International Criminal Justice* 71-95.

Burke-White, William W., 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' (2008) 49 (1) *Harvard International Law Journal* 53-108.

Buss, Doris, 'Prosecuting Mass Rape: Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic' (2002) 10 *Feminist Legal Studies* 91-99.

Carlsmith, Kevin M., et al., 'Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment' (2002) 83 (2) *Journal of Personality and Social Psychology* 284-299.

Cassel, Douglass, 'The ICC's New Legal Landscape: The Need to Expand U.S. Domestic Jurisdiction to Prosecute Genocide, War Crimes, and Crimes Against Humanity' (1999-2000) 23 *Fordham International Law Journal* 378-397.

Cassel, Douglass, 'Empowering United States Courts to Hear Crimes Within the Jurisdiction of the International Criminal Court' (2001) 35 *New England Law Review* 421-445.

Cassese, Antonio, 'The ICTY: A Living and Virtual Reality' (2004) 2 *Journal of International Criminal Justice* 585-597.

Cerone, John, 'The Application of Regional Human Rights Law Beyond Regional Frontiers: The Inter-American Commission on Human Rights and US Activities in Iraq' (2005) *ASIL Insight*.

Cerone, John, 'Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations' (2006) 39 *Vanderbilt Journal of Transnational Law* 1447-1510.

Chang, Emily Nyen, 'Engagement Abroad: Enlisted Men, U.S. Military Policy and the Sex Industry' (2001) 15 *Notre Dame Journal of Law, Ethics & Public Policy* 621-653.

Charlesworth, Hilary, 'Alienating Oscar? Feminist Analysis of International Law' (1993) 25 *Stud. Transnational Legal Policy* 1-18.

Charlesworth, Hilary, 'Cries and Whispers: Responses to Feminist Scholarship in International Law' (1996) 65 *Nordic Journal of International Law* 557-568.

Charlesworth, Hilary, 'Feminist Methods in International Law' (1999) 93 *American Journal of International Law* 379-394.

Charlesworth, Hilary, et al., 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613-645.

Cooper, Belinda, 'Prostitution: A Feminist Analysis' (1989) 11 *Women's Rights Law Reporter* 99-119.

Côté, Luc, 'Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law' (2005) 3 *Journal of International Criminal Justice* 162-186.

Crawford, Emily, 'Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-international Armed Conflicts' (2007) 20 *Leiden Journal of International Law* 441-465.

Currie, Robert J., 'Human Rights and International Mutual Legal Assistance: Resolving the Tension' (2000) 11 *Criminal Law Forum* 143-181.

de Jong, Katherine, 'On Equality and Language' (1985) 1 *Canadian Journal of Women and Law* 119-133.

Dempsey, M. Madden, 'Rethinking Wolfenden: Prostitute-Use, Criminal Law, and Remote Harm' (2005) June *Criminal Law Review* 444-455.

Dixon, Rosalind, 'Rape as a Crime in International Humanitarian Law: Where to from Here?' (2002) 13 (3) *European Journal of International Law* 697-719.

Duncanson, Claire, 'Forces for Good? Narratives of Military Masculinity in Peacekeeping Operations' (2009) 11 (1) *International Feminist Journal of Politics* 63-80.

Dunlap, William V., 'Dual Criminality in Penal Transfer Treaties' (1988-1989) 29 *Virginia Journal of International Law* 813-858.

Eichelman, Captain Mark E., 'International Criminal Jurisdiction Issues for the United States Military' (2000) *The Army Lawyer* 23-32.

El Zeidy, Mohamed M., 'The Gravity Threshold Under the Statute of the International Criminal Court' (2008) 19 *Criminal Law Forum* 35-57.

Ellis, Mark S., 'The International Criminal Court and Its Implication for Domestic Law and National Capacity Building' (2002) 15 (2) *Florida Journal of International Law* 215-242.

Ellis, Mark S., 'International Justice and the Rule of Law: Strengthening the ICC through Domestic Prosecutions' (2009) 1 (1) *Hague Journal on the Rule of Law* 79-86.

Engle, Karen, 'International Human Rights and Feminism: When Discourses Meet' (1991-1992) 13 *Michigan Journal of International Law* 517- 610.

Ero, Comfort, 'ECOWAS and the Subregional Peacekeeping in Liberia' (1995) *Journal of Humanitarian Assistance*.

Everett, Robinson O., 'Military Jurisdiction Over Civilians' (1960) 1960 *Duke Law Journal* 366-415.

Faulhaber, Lilian J., 'American Servicemembers' Protection Act of 2002' (2003) 40 (2) *Harvard Journal on Legislation* 537-557.

Finley, Lucinda M., 'Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning' (1989) 64 *Notre Dame Law Review* 886-910.

Fleck, Dieter, 'Are Foreign Military Personnel Exempt from International Criminal Jurisdiction under Status of Forces Agreements?' (2003) 1 (3) *Journal of International Criminal Justice* 651-670.

Gaeta, Paola, 'The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law' (1999) 10 *European Journal of International Law* 172-191.

Garraway, Charles, 'Superior orders and the International Criminal Court: Justice delivered or justice denied' (1999) 836 *International Review of the Red Cross* 785-794.

Garraway, Charles H.B., 'Editorial Comment: Abu Ghraib- Another Black Hole? Military Excesses? Is There a 'Right Way' of Dealing?' (2004) 2 *Journal of International Criminal Justice* 981-987.

Gibson, Major Susan S., 'Lack of Extraterritorial Jurisdiction Over Civilians: A New Look at an Old Problem' (1995) 148 *Military Law Review* 114-185.

Glasier, Anna, et al., 'Sexual and reproductive health: a matter of life and death' (2006) 368 (9547) *The Lancet* 1595-1607.

Gray, Christine, 'Peacekeeping after the Brahimi Report: Is there a crisis of credibility for the UN?' (2001) 6 *Journal of Conflict and Security Law* 267-288.

Green, Leslie C., 'Superior Orders and Command Responsibility' (2003) 175 *Military Law Review* 309-384.

Greenawalt, Alexander K.A., 'Justice Without Politics? Prosecutorial Discretion and the International Criminal Court' (2007) 39 *NYU Journal of International Law and Politics* 583-673.

Greenwood, Christopher, 'International Humanitarian Law and United Nations Military Operations' (1998) 1 *Yearbook of International Humanitarian Law* 3-34.

Griffith, Gavan and Harris, Claire, 'Recent Developments in the Law of Extradition' (2005) 6 *Melbourne Journal of International Law* 33-54.

Grimes, David A, et al., 'Unsafe abortion: the preventable pandemic' (2006) 368 (9550) *The Lancet* 1908-1919.

Hafen, Jonathan O., 'International Extradition: Issues Arising Under the Dual Criminality Requirement' (1992) *Brigham Young University Law Review* 191-230.

Halley, Janet, et al., 'From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism' (2006) 29 *Harvard Journal of Law & Gender* 335-423.

Halvorsen, Kate, 'Notes on the Realization of the Human Right to Education' (1990) 12 *Human Rights Quarterly* 341-364.

Henry, Nicola, 'Witness to Rape: The Limits and Potential of International War Crimes Trials for Victims of Wartime Sexual Violence' (2010) 2 (1) *International Journal of Transitional Justice* 114-134.

Higate, Paul, 'Peacekeepers, Masculinities and Sexual Exploitation' (2007) 10 (1) *Men and Masculinities* 99-119.

Higate, Paul and Henry, Marsha, 'Engendering (In)security in Peace Support Operations' (2004) 35 (4) *Security Dialogue* 481-498.

Houck, James W., 'The Command and Control of United Nations Forces in the Era of "Peace Enforcement"' (1993-1994) 4 *Duke Journal of Comparative and International Law* 1-69.

Howland, Todd, 'Peacekeeping and Conformity with Human Rights Law: How MINUSTAH Falls Short in Haiti' (2006) 13 (4) *International Peacekeeping* 462-476.

Hunter, Susan Kay, 'Prostitution is Cruelty and Abuse to Women and Children' (1993) 1 *Michigan Journal of Gender and Law* 91-104.

Jallow, Hassan B., 'Prosecutorial Discretion and International Criminal Justice' (2005) 3 *Journal of International Criminal Justice* 145-161.

Johnson, M. Tia, 'The American Servicemembers' Protection Act: Protecting Whom?' (2003) 43 *Virginia Journal of International Law* 405-484.

Kamman, James M., 'Parker v Levy- Conduct Unbecoming an Officer and a Gentleman' (1974-1975) 2 *Pepperdine Law Review* 435-444.

Kelly, Michael J., et al., 'Legal aspects of Australia's involvement in the International Force for East Timor' (2001) (841) *International Review of the Red Cross* 101-139.

Kieft, Christopher M. Van de, 'Uncertain Risk: The United States Military and the International Criminal Court' (2002) 23 *Cardozo Law Review* 2325-2368.

Kirsch, Phillippe, 'The Convention on the Safety of United Nations and Associated Personnel' (1995) *International Peacekeeping* 102-106.

Koskenniemi, Martti, 'The Police in the Temple; Order, Justice and the UN: A Dialectical View' (1995) 6 *European Journal of International Law* 325-348.

Lantto, Megan E., 'The United States and the International Criminal Court: A Permanent Divide?' (2008) 31 *Suffolk Transnational Law Review* 649-646.

Larson, Jane E., 'Prostitution, Labor, and Human Rights' (2004) 37 (3) *U.C. Davis Law Review* 673-700.

Leidholdt, Dorchen, 'Prostitution: A Violation of Women's Human Rights' (1993-1994) 1 *Cardozo Women's Law Journal* 133-147.

Levitt, Kenneth E., 'International Extradition, the Principle of Speciality, and Effective Treaty Enforcement ' (1992) 76 (4) *Minnesota Law Review* 1017-1040.

Lippman, Matthew, 'Humanitarian Law: The Uncertain Contours of Command Responsibility' (2001) 9 *Tulsa Journal of Comparative & International Law* 1-93.

MacKinnon, Catharine A., 'From Practice to Theory, or What is a White Woman Anyway?' (1991) 4 *Yale Journal of Law and Feminism* 13-22.

MacKinnon, Catharine A., 'Defining Rape Internationally: A Comment on Akayesu' (2006) 44 *Columbia Journal of Transnational Law* 940-958.

MacKinnon, Catharine A., 'The ICTR's Legacy on Sexual Violence' (2008) 14 *New England Journal of International and Comparative Law* 101-110.

MacKinnon, Catherine A., 'Prostitution and Civil Rights' (1993) 1 *Michigan Journal of Gender and Law* 13-31.

Mann, Gregory J., 'The European Arrest Warrant: A Short-Lived Mechanism for Extradition?' (2006-2007) 34 *Syracuse Journal of International Law & Commerce* 715-740.

Månsson, Katarina, 'Integration of Human Rights in Peace Operations: Is There An Ideal Model?' (2006) 13 (4) *International Peacekeeping* 547-563.

Maogoto, Jackson Nyamuya, 'Watching the Watchdogs: Holding the UN Accountable for Violations of International Humanitarian Law by the 'Blue Helmets'' (2000) 5 (1) *Deakin Law Review* 47-80.

Marston Danner, Allison, 'Constructing a Hierarchy of Crimes in International Criminal Law Sentencing' (2001) 87 (3) *Virginia Law Review* 415-501.

Marston Danner, Allison, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 (3) *American Journal of International Law* 510-552.

McCormack, Timothy L.H. and Robertson, Sue, 'Jurisdictional Aspects of the Rome Statute for the New International Criminal Court' (1999) 23 *Melbourne University Law Review* 635-666.

McNeill, John H., 'International Agreements: Recent U.S.-UK Practice Concerning the Memorandum of Understanding' (1994) 88 *American Journal of International Law* 821-826.

Meloni, Chantal, 'Command responsibility: mode of liability for the crimes of subordinates or separate offence of the superior?' (2007) 5 (3) *Journal of International Criminal Justice* 619-637.

Meron, Theodor, 'Rape as a Crime under International Humanitarian Law' (1993) 87 (3) *American Journal of International Law* 424-428.

Messineo, Francesco, 'The House of Lords in Al-Jedda and Public International Law: Attribution of Conduct to UN-Authorized Forces and the Power of the Security Council to Displace Human Rights' (2009) 56 (1) *Netherlands International Law Review* 35-62.

Miller, Coty R. and Haltiwanger, Nuria, 'Prostitution and the Legalization/Decriminalization Debate' (2004) V *Georgetown Journal of Gender and the Law* 207-242.

Miller, Sarah, ' Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention' (2010) 20 (4) *European Journal of International Law* 1223-1246.

Minow, Martha, 'Justice Engendered' (1987) 101 *Harvard Law Review* 10-95.

Minow, Martha, 'Beyond Universality' (1989) *University of Chicago Legal Forum* 115-138.

Murphy, Ray, 'Legal Framework of UN Forces and Issues of Command and Control of Canadian and Irish Forces' (1999) 4 *Journal of Armed Conflict Law* 41-73.

Murphy, Ray, 'International humanitarian law training for multinational peace support operations-lessons from experience' (2000) (840) *International Review of the Red Cross* 953-968.

Murphy, Ray, 'United Nations Military Operations and International Humanitarian Law' (2003) 14 *Criminal Law Forum* 153-194.

Murphy, Ray, 'An Assessment of UN Efforts to Address Sexual Misconduct by Peacekeeping Personnel' (2006) 13 (4) *International Peacekeeping* 531-546.

Murphy, Ray, 'Gravity Issues and the International Criminal Court' (2006) 17 *Criminal Law Forum* 281-315.

Murphy, Ray and Månsson, Katarina, 'Perspectives on Peace Operations and Human Rights' (2006) 13 (4) *International Peacekeeping* 457-461.

Murphy, Sean D., 'Efforts to Gain Immunity from ICC for U.S. Peacekeepers' (2002) 96 *American Journal of International Law* 725-729.

Murray, Jennifer, 'Who Will Police the Peace-Builders? The Failure to Establish Accountability for the Participation of United Nations Civilian Police in the Trafficking of Women in Post-Conflict Bosnia and Herzegovina' (2003) 34 *Columbia Human Rights Law Review* 475-527.

Muther Jr, Thomas F., 'The Extradition of International Criminals: A Changing Perspective' (1995-1996) 24 *Denver Journal of International Law and Policy* 221-228.

Ndulo, Muna, 'The United Nations Responses To The Sexual Abuse And Exploitation Of Women And Girls By Peacekeepers During Peacekeeping Missions' (2009) 27 (1) *Berkeley Journal of International Law* 127-161.

Nelson, Kathryn E., 'Sex Trafficking and Forced Prostitution: Comprehensive New Legal Approaches' (2001-2) 24 *Houston Journal of International Law* 551-578.

Nelson, Keith E., 'Conduct Expected of an Officer and a Gentleman: Ambiguity' (1970) 12 (2) *U.S. A.F. JAG Law Review* 124-141.

Newton, Michael A., 'Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court' (2001) *Military Law Review* 20-73.

Noone, Michael, 'The U.S. Approach to Combating Trafficking in Women: Prosecuting Military Customers. Could it Be Exported?' (2005) IV (4) *The Quarterly Journal* 81-89.

Nsereko, Daniel D. Ntanda, 'Prosecutorial Discretion before National Courts and International Tribunals' (2005) 3 *Journal of International Criminal Justice* 124-144.

O'Brien, Melanie, 'The Impact of the Iraq Communication of the Prosecutor of the International Criminal Court on War Crimes Admissibility and the Interests of Victims' (2007) Symposium Edition *University College Dublin Law Review* 109-125.

O'Connell Davidson, Julia, 'The Rights and Wrongs of Prostitution' (2002) 17 (2) *Hypatia* 84-98.

Öberg, Marko Divac, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ' (2005) 16 (5) *European Journal of International Law* 879-906.

Obote-Odora, Alex, 'Rape and Sexual Violence in International Law: ICTR Contribution' (2005) 12 *New England Journal of International and Comparative Law* 135-159.

Oswald, Bruce, 'The Law on Military Occupation: Answering the Challenges of Detention During Contemporary Peace Operations?' (2007) 8 (2) *Melbourne Journal of International Law* 311-326.

Oswald, Bruce and Finnin, Sarah, 'Combating the Trafficking of Persons on Peace Operations' (2006) 10 *International Peacekeeping: The Yearbook of International Peace Operations* 1-32.

Oswald, Bruce M., 'Model Codes for Criminal Justice and Peace Operations: Some Legal Issues' (2004) 9 (2) *Journal of Conflict and Security Law* 253-275.

Overall, Christine, 'What's Wrong With Prostitution? Evaluating Sex Work' (1992) 17 (4) *Signs* 705-724.

Pallen, Daniel, 'Sexual Slavery in Bosnia: The Negative Externality of the Market for Peace' (2003) XIII (1) *Swords & Ploughshares* 27-43.

Palwankar, Umesh, 'Applicability of international humanitarian law to United Nations peace-keeping forces' (1993) (294) *International Review of the Red Cross* 227-240.

Paust, Jordan, 'The Reach of ICC Jurisdiction Over Non-Signatory Nationals' (2000) 33 (1) *Vanderbilt Journal of Transnational Law* 1-11.

Paust, Jordan J., 'Congress and Genocide: They're Not Going To Get Away With It' (1989) 11 *Michigan Journal of International Law* 90-104.

Perlak, Joseph R., 'The Military Extraterritorial Jurisdiction Act of 2000: Implications for Contractor Personnel' (2001) 169 *Military Law Review* 92-140.

Pittman, Thomas Wayde and Heaphy, Matthew, 'Does the United States Really Prosecute Its Service Members for War Crimes? Implications for Complementarity before the International Criminal Court' (2008) 21 *Leiden Journal of International Law* 165-183.

Preston, R. Christopher and Ahrens, Ronald Z., 'United Nations Convention Documents in Light of Feminist Theory' (2001-2002) 8 *Michigan Journal of Gender and Law* 1-43.

Quénivet, Noëlle, 'The Dissonance between the United Nations Zero-Tolerance Policy and the Criminalisation of Sexual Offences on the International Level' (2007) 7 *International Criminal Law Review* 657-676.

Raustiala, Kal, 'Form and Substance in International Agreements' (2005) 99 (3) *The American Journal of International Law* 581-614.

Ray, Nilanjana, 'Looking at Trafficking Through a New Lens' (2006) 12 *Cardozo Journal of Law & Gender* 909-927.

Risch, Stuart W. , 'Hostile Outsider or Influential Insider? The United States and the International Criminal Court' (2009) May *Army Lawyer* 61-89.

Rowe, Peter, 'Maintaining Discipline in United Nations Peace Support Operations: The Legal Quagmire for Military Contingents' (2000) 5 (1) *Journal of Conflict and Security Law* 45-62.

Rubin, Alfred P., 'The International Criminal Court: Possibilities for Prosecutorial Abuse' (2001) 64 (1) *Law and Contemporary Problems* 153-165.

SaCouto, Susana, 'Advances and Missed Opportunities in the International Prosecutions of Gender-Based Crimes' (2006-2007) 10 *Gonzaga Journal of International Law* 49-56.

Sagala, John Kemoli, 'HIV/AIDS and the Military in Sub-Saharan Africa: Impact on Military Organizational Effectiveness' (2006) 53 (1) *Africa Today* 53-77.

Schabas, William A., 'The Jelisis Case and the Mens Rea of the Crime of Genocide' (2001) 14 *Leiden Journal of International Law* 125-139.

Schabas, William A., 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court' (2008) 6 (4) *Journal of International Criminal Justice* 731.

Schaffer, Robert, 'Sex among Allies: Military Prostitution in U.S.-Korea Relations' (1999) 10 (2) *Journal of World History* 499-502.

Scheffer, David, 'Genocide and Atrocity Crimes' (2006) 1 (3) *Genocide Studies and Prevention* 229-250.

Scheffer, David J., 'Article 98(2) of the Rome Statute: America's Original Intent' (2005) 3 (2) *Journal of International Criminal Justice* 333-353.

Schlueter, David A., 'The Court-Martial: An Historical Survey' (1980) 87 *Military Law Review* 129-166.

Schmitt, Captain Glenn R., 'The Military Extraterritorial Jurisdiction Act: The Continuing Problem of Criminal Jurisdiction Over Civilians Accompanying the Armed Forces Abroad- Problem Solved?' (2000) *The Army Lawyer* 1-10.

Schmitt, Major Glenn R., 'Amending the Military Extraterritorial Jurisdiction Act of 2000: Rushing to Close an Unforeseen Loophole' (2005) *The Army Lawyer* 41-47.

Schomburg, Wolfgang and Peterson, Ines, 'Genuine Consent to Sexual Violence under International Criminal Law' (2007) 101 (1) *American Journal of International Law* 121-140.

Shraga, Daphne, 'UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage' (2000) 94 (2) *American Journal of International Law* 406-412.

Simester, A. P. and von Hirsch, Andrew, 'Rethinking the Offense Principle' (2002) 8 (3) *Legal Theory* 269-295.

Simic, Olivera, 'Rethinking 'sexual exploitation' in UN peacekeeping operations' (2009) 32 *Women's Studies International Forum* 288-295.

Sloan, James, 'Prosecutor v Dragan Nikolic: Decision on Defence Motion on Illegal Capture' (2003) 16 *Leiden Journal of International Law* 541-552.

Smith, Stephen Eliot, 'Inventing the Laws of Gravity: The ICC's Initial Lubanga Decision and its Regressive Consequences' (2008) 8 *International Criminal Law Review* 331-352.

Starmer, Keir, 'Responsibility for troops abroad: UN mandated forces and issues of human rights accountability' (2008) (3) *European Human Rights Law Review*.

Stein, Fredrick A., 'Have We Closed the Barn Door Yet? A Look at the Current Loopholes in the Military Extraterritorial Jurisdiction Act' (2005) 27 *Houston Journal of International Law* 579-607.

Steven, Lee A., 'Note: Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of its International Obligations' (1999) 39 *Virginia Journal of International Law* 425-466.

Sun, Sue, 'Where the Girls Are: The Management of Venereal Disease by United States Military Forces in Vietnam' (2004) 23 (1) *Literature and Medicine* 66-87.

Takemura, Hitomi, 'Big Fish and Small Fish Debate- An Examination of the Prosecutorial Discretion' (2007) 7 *International Criminal Law Review* 677-685.

Talbot Jensen, Eric and Teixeira, James J., 'Prosecuting Members of the U.S. Military for Wartime Environmental Crimes' (2005) XVII (4) *Georgetown International Environmental Law Review* 651-671.

Talleyrand, Isabelle, 'Military Prostitution: How the Authorities Worldwide Aid and Abet International Trafficking in Women' (2000) 27 *Syracuse Journal of International Law & Commerce* 151-176.

Teson, Fernando R., 'Feminism and International Law: A Reply' (1992-1993) 33 *Virginia Journal of International Law* 647-684.

Tittmore, Brian D., 'Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations' (1997) 33 *Stanford Journal of International Law* 61-117.

Triffterer, Otto, 'Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such' (2001) 14 *Leiden Journal of International Law* 399-408.

Turner, Lieut. Colonel Thomas B., 'The Suppression of Prostitution in Relation to Venereal Disease Control in the Army' (1943) 7 *Federal Probation* 8-11.

Valdes, Francisco, 'Whats the Fuss? Constitutionalism, Internationalism, and Original Method' (2007) 3 (1) *Florida International University Law Review* 1-26.

Van den Wyngaert, Christine, 'Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?' (1990) 39 *International and Comparative Law Quarterly* 757-779.

Van der Vyer, Johan D., 'Prosecution and Punishment of the Crime of Genocide' (1999) 23 *Fordham International Law Journal* 286-356.

van der Vyer, Johan D., 'American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness' (2001) 50 *Emory Law Journal* 775-832.

Van Schaack, Beth, 'International Law in the United States Legal System: Observance, Application, and Enforcement' (2005) 45 *Santa Clara Law Review* 807-815.

Vetter, Greg R., 'Command Responsibility of Non-Military Superiors in the International Criminal Court' (2000) 25 *Yale Journal of International Law* 89-143.

Vierucci, Luisa, 'The European Arrest Warrant An Additional Tool for Prosecuting ICC Crimes' (2004) 2 (1) *Journal of International Criminal Justice* 275-284.

Viseur Sellers, Patricia, 'Sexual Violence and Peremptory Norms: The Legal Value of Rape' (2002) 34 *Case Western Reserve Journal of International Law* 287-303.

Vité, Sylvain, 'L'applicabilité du droit international de l'occupation militaire aux activités des organisations internationales' (2004) 86 (853) *International Review of the Red Cross* 9-34.

von Galen, Margaret, 'Prostitution and the Law in Germany' (1996) 3 *Cardozo Women's Law Journal* 349-376.

Wald, Patricia M., 'ICTY Judicial Proceedings: An Appraisal from Within' (2004) 2 *Journal of International Criminal Justice* 466-473.

White, James B., 'Making Sense of the Criminal Law' (1978) 50 *University of Colorado Law Review* 1-27.

White, Major Martin N., 'Charging War Crimes: A Primer for the Practitioner' (2006) *The Army Lawyer* 1-11.

Wilde, Ralph, 'Legal "Black Hole"? Extraterritorial State Action and International Treaty Law on Civil and Political Rights' (2004-2005) 26 *Michigan Journal of International Law* 739-806.

Zaid, Mark S., 'Will or Should the United States ever Prosecute War Criminals?: A Need for Greater Expansion in the Areas of Both Criminal and Civil Liability' (2001) 35 *New England Law Review* 447-469.

Zappala, Salvatore, 'Are Some Peacekeepers Better Than Others? UN Security Council Resolution 1497 (2003) and the ICC' (2003) 1 *Journal of International Criminal Justice* 671-678.

Zappala, Salvatore, 'The Reaction of the US to the Entry into Force of the ICC Statute: Comments on UN SC Resolution 1422 (2002) and Article 98 Agreements' (2003) 1 (1) *Journal of International Criminal Justice* 114-134.

Zwanenburg, Marten, 'Double Standards in Peacekeeping? Subcontracting Peacekeeping and International Humanitarian Law' (1999) 12 *Leiden Journal of International Law* 753-757.

Bickford, Andrew, 'See the World, Meet Interesting People, Have Sex With Them: Tourism, Sex, and Recruitment in the U.S. Military', *American Sexuality magazine*, (2003).

Higate, Paul, 'Peacekeeping and Gendered Relations', *Peace & Conflict Monitor*, (2003).

McConnell, Tristan, 'All-female unit keeps peace in Liberia', *The Christian Science Monitor*, (2007).

'Burundi: Growing discontent with South African troops', *The Norwegian Council for Africa*, (16 March 2005), <http://www.afrika.no/Detailed/8616.html>.

'Cote d'Ivoire: French peacekeeping force opens inquiry into sex abuse claims', *IRIN*, (20 May 2005), <http://www.irinnews.org/report.aspx?reportid=54555>.

'DRC-Nigeria: 11 policemen suspended over sex abuse allegations in DR Congo', *IRIN*, (27 September 2005), <http://www.irinnews.org/report.aspx?reportid=56514>.

'UN troops face child abuse claims', *BBC News*, (30 November 2006), <http://news.bbc.co.uk/1/hi/world/americas/6195830.stm>.

Belczyk, Jaclyn, 'Military jury acquits Marine of all charges in Fallujah detainee killing ', *Jurist*, (9 April 2009), <http://jurist.law.pitt.edu/paperchase/2009/04/military-jury-acquits-marine-of-all.php>.

Charbonneau, Louise, 'Peacekeepers may have committed sex abuse in Congo-UN ', *Reuters AlertNet*, (12 August 2008), <http://www.alertnet.org/thenews/newsdesk/N12498196.htm>.

de Pommereau, Isabelle, 'Rethinking the legal sex trade', *The Christian Science Monitor*, (11 May 2005), <http://www.csmonitor.com/2005/0511/p15s02-woeu.html>.

Dodd, Mark, 'Hushed rape of Timor', *The Weekend Australian*, (26 March 2005), <http://www.etan.org/et2005/march/20/26hushed.htm>.

Higate, Paul, 'Peacekeepers and Gender: DRC and Sierra Leone', *Pambazuka News*, (8 July 2004), <http://www.pambazuka.org/#2>.

Holt, Kate and Hughes, Sarah, 'UN staff accused of raping children in Sudan', *Daily Telegraph*, (2 January 2007), <http://www.telegraph.co.uk/news/worldnews/1538396/UN-staff-accused-of-raping-children-in-Sudan.html>.

Klapper, Bradley S., 'UN: 50 peacekeepers punished for sex abuses', *Associated Press*, (9 November 2009), <http://www.google.com/hostednews/ap/article/ALeqM5jMJ30OyX6btcjGlkS1HAobqkw-JwD9BPE1682>.

Lindsay, Reed, 'U.N. peacekeepers accused of rape', *The Washington Times*, (17 December 2006), <http://www.washingtontimes.com/news/2006/dec/17/20061217-122119-4767r/>.

Montgomery, Devin, 'India peacekeeping forces accused of committing sex crimes in Congo', *Jurist*, (13 August 2008), <http://jurist.law.pitt.edu/paperchase/2008/08/india-peacekeeping-troops-accused-of.php>.

Shaulis, Joe, 'US civilian jury acquits ex-Marine of Fallujah killings ', *Jurist*, (29 August 2008), <http://jurist.law.pitt.edu/paperchase/2008/08/us-civilian-jury-acquits-ex-marine-of.php>.

Wald, Jonathan, 'U.N. accuses force of sex abuse', *CNN*, (8 January 2005), <http://www.cnn.com/2005/WORLD/africa/01/08/congo.peacekeepers.sex/>.

Williams, Carol J., 'Sex scandal in Haiti hits U.N. mission', *Baltimore Sun*, (16 December 2007), <http://www.baltimoresun.com/news/world/bal-te.haiti16dec16,0,3111217.story>.

'U.N. Peacekeeping: United Nations Faces Challenges in Responding to the Impact of HIV/AIDS on Peacekeeping Operations' (United States General Accounting Office, Washington, D.C., 12 December 2001) GAO-02-194.

'Note for Implementing and Operation Partners on Sexual Violence and Exploitation: The Experience of Refugee Children in Guinea, Liberia and Sierra Leone' (UNHCR and Save the Children UK, February 2002)

'Trafficking in Human Beings in Southeastern Europe: Current Situation and Responses to Trafficking in Human Beings' (UNICEF, UNOHCHR, OSCE ODIHR, 2002)

'Trafficking, Slavery and Peacekeeping: The Need for a Comprehensive Training Program. A Conference Report.' (Transnational Crime and Corruption Centre & UN Interregional Crime and Justice Research Institute, Turin, 9-10 May 2002)

'International Criminal Court: The unlawful attempt by the Security Council to give US citizens permanent impunity from international justice' (Amnesty International, London, May 2003) IOR 40/006/2003.

'Kosovo (Serbia and Montenegro) "So does it mean that we have the rights?" Protecting the human rights of women and girls trafficked for forced prostitution in Kosovo' (Amnesty International, 6 May 2004) EUR 70/010/2004.

'From Camp to Community: Liberia study on exploitation of children' (Save the Children UK, Monrovia, 8 May 2006)

Ajayi, Titilope, 'The UN, the AU and ECOWAS – A Triangle for Peace and Security in West Africa?' (Freidrich Ebert Stiftung, New York, November 2008)

Albright, Madeleine K. and Cohen, William S., 'Preventing Genocide: A Blueprint for U.S. Policymakers' (United States Holocaust Memorial Museum, The American Academy of Diplomacy, and the Endowment of the United States Institute of Peace Washington, DC, 2008)

Foreman, Martin, 'Combat AIDS: HIV and the World's Armed Forces' (Healthlink Worldwide, London, 2002)

Gronow, Jane, 'Trafficking in Human Beings in Southeastern Europe' (UNICEF, 15 August 2000)

Grossman, Marc, 'American Foreign Policy and the International Criminal Court ' (Centre for Strategic and International Studies, Washington, DC, 6 May 2002)

Higate, Paul, 'Gender and Peacekeeping Case Studies: The DRC and Sierra Leone' (Institute for Security Studies, March 2004) ISS Monograph No. 91.

Martin, Sarah, 'Must Boys be Boys? Ending Sexual Exploitation & Abuse in UN Peacekeeping Missions' (Refugees International, October 2005)

Mendelson, Sarah E., 'Barracks and Brothels: Peacekeepers and Human Trafficking in the Balkans' (Center for Strategic and International Studies (CSIS), Washington, D.C., February 2005)

Porretto, Gabriele and Vité, Sylvain, 'The application of international humanitarian law and human rights law to international organisations' (University Centre for International Humanitarian Law, Geneva, 2006) 1.

Rowe, Peter, 'Do Soldiers Really Have to Apply Human Rights Law in Military Operations?' (United Nations Association, Westminster Branch, 16 May 2006)

Schade, Ernst, 'Experiences with regard to The United Nations Peace-Keeping Forces in Mozambique' (International Save the Children Alliance, Barrio, 20 November 1995)

Secretary-General, 'In-depth study on all forms of violence against women: Report of the Secretary-General' (United Nations General Assembly, 6 July 2006) A/61/122/Add.1.

Vandenberg, Martina, 'Hopes Betrayed: Trafficking of Women and Girls to Post-Conflict Bosnia and Herzegovina for Forced Prostitution' (Human Rights Watch, New York, November 2002) Vol. 14, No. 9 (D).

Ziegler, Karley, 'Challenges of Peace Operations: Into the 21st Century, Report on the VIII Seminar Human Rights and Gender Issues in Peacekeeping' (Pearson Peacekeeping Centre, Cornwallis, Nova Scotia, Canada, 28 May-1 June 2001)

Joutsen, Matti, 'The European Union and Cooperation in Criminal Matters: the Search for Balance' (Helsinki 2006).